

EXHIBIT 2

**FILED UNDER SEAL PURSUANT TO
PROTECTIVE ORDER**

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

IN RE: SOUTHEASTERN MDL No. 1899
MILK ANTITRUST Master File No.
LITIGATION 2:08-MD-1000
The Honorable J. Ronnie
Greer, United States
District Judge
The Honorable Dennis
H. Inman, United States
Magistrate Judge

The videotaped deposition of JOHN C. BEYER,
Ph.D., called by the Defendants for examination,
pursuant to notice and pursuant to the Federal
Rules of Civil Procedure for the United States
District Courts pertaining to the taking of
depositions, was convened on Thursday, June 18,
2009, commencing at 9:10 a.m., at the offices of
Williams & Connolly, 555 Twelfth Street,
Northwest, Washington, D.C., before Paula G.

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<p>1 Satkin, Registered Professional Reporter and 2 Notary Public. 3 4 - - - - - 5 6 7 APPEARANCES 8 9 ON BEHALF OF DFA, DMS, AND MID-AM: STEVEN R. KUNEY, ATTORNEY AT LAW 10 KEVIN HARDY, ATTORNEY AT LAW SIMON A. LATCOVICH, ATTORNEY AT LAW 11 WILLIAMS & CONNOLLY LLP 725 Twelfth Street, NW 12 Washington, DC 20005 slatcovich@wc.com 13 14 ON BEHALF OF THE CLASS PLAINTIFFS: ROBERT J. BROOKHISER, ATTORNEY AT LAW 15 HOWREY LLP 1299 Pennsylvania Avenue, Northwest 16 Washington, DC 20004-2402 (202) 383-6598 brookhiserb@howrey.com 17 18 ON BEHALF OF THE DEFENDANT SOUTHERN MARKETING AGENCY, INC.: 19 KARI ROLLINS, ATTORNEY AT LAW WINSTON & STRAWN LLP 20 35 West Wacker Drive Chicago, Illinois 60601 21 (312) 558-5600 karollins@winston.com 22 23 24</p>	<p>1 CONTENTS 2 3 JOHN BEYER EXAMINATION BY MR. KUNEY 7 4 5 DEPOSITION EXHIBITS 6 NUMBER/DESCRIPTION IDENTIFIED Exhibit 407 Report of John C. Beyer 7 7 Exhibit 408 157 8 Letter from Michelle Goolsby - Dean Foods 9 Exhibit 409 190 10 Dairy Production in FL & Southeast Orders 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p>
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<p>1 ON BEHALF OF THE DEFENDANT DEAN FOODS COMPANY: PAUL D. FRANGIE, ATTORNEY AT LAW 2 DECHERT LLP 1775 I Street, Northwest 3 Washington, DC 20006-2401 (202) 261-33300 paul.frangie@dechert.com 4 5 6 ON BEHALF OF DEFENDANT NATIONAL DAIRY: KAY LYNN BRUMBAUGH, ATTORNEY AT LAW ANDREWS KURTH 7 1717 Main Street Suite 3700 8 Dallas, Texas 75201 (214) 659-4702 kaylynnbrumbaugh@andrewskurth.com 9 10 ON BEHALF OF DEFENDANT FOOD LION: MICHAEL CONVERSE, ATTORNEY AT LAW HUNTON & WILLIAMS 11 1900 K Street, NW Washington, DC 20006-1109 12 (202) 955-1500 mconverse@hunton.com 13 14 ON BEHALF OF DEFENDANT GARY HANMAN: DAVID E. EVERSON, ATTORNEY AT LAW 15 STINSON MORRISON HECKER LLP 10975 Benson, Suite 550 16 12 Corporate Woods Overland Park, Kansas 66210 17 (816) 691-3108 deverson@stonson.com 18 19 ON BEHALF OF DEFENDANT GERALD BOS: BRANDON J.B. BOULWARE, ATTORNEY AT LAW ROUSE HENDRICKS GERMAN MAY PC 20 One Petticoat Lane Building 1010 Walnut Street, Suite 400 21 Kansas City, Missouri 64106 (816) 471-7700 22 23 THOMPSON COURT REPORTERS: PAULA G. SATKIN, RPR 24 MIA MARBURY, VIDEOGRAPHER</p>	<p>1 PROCEEDINGS 2 3 THE VIDEOGRAPHER: Good morning. 4 Here begins the videotaped deposition of 5 Dr. John Beyer, tape one, Volume I, in the 6 matter of In Re: Southeastern Milk Antitrust, 7 In the United States District Court, For the 8 Eastern District of Tennessee, Greeneville 9 Division, Case Number 2:08-MD-1000. 10 Today's date is June 18th, 2009. 11 The time on the video screen is 9:09:52. 12 My name is Mia Marbury, and the 13 court reporter today is Paula Satkin of Thompson 14 Court Reporters. 15 Today's deposition is being taken 16 on behalf of the Defendant and it's taking place 17 at Williams & Connolly in Washington, D.C. 18 Will counsel please introduce 19 themselves and state whom they represent, 20 beginning with the noticing party. 21 MR. KUNEY: This is Steven Kuney 22 from Williams & Connolly. We represent DFA, DMS 23 and Mid-Am Capital. 24 MR. HARDY: Kevin Hardy, also from</p>

<p style="text-align: right;">Page 6</p> <p>1 Williams & Connolly, and also representing DFA, 2 DMS, and Mid-Am. 3 MR. FRANGIE: Paul Frangie from 4 Dechert LLP, representing Dean Foods Company. 5 MS. BRUMBAUGH: Kay Lynn Brumbaugh 6 from Andrews Kurth, representing National Dairy. 7 MS. ROLLINS: Kari Rollins from 8 Winston & Strawn, representing Defendant SMA. 9 MR. LATCOVICH: Simon Latcovich, 10 from Williams & Connolly, also representing DFA, 11 DMS, and Mid-Am Capital. 12 MR. BROOKHISER: Bob Brookhiser 13 from Howrey LLP on behalf of the Dairy Farmer 14 Plaintiffs. 15 MR. CONVERSE: Michael Converse 16 from Hunton & Williams representing Retail 17 Plaintiffs, Food Lion and Fidel Breta. 18 THE VIDEOGRAPHER: Thank you, 19 ladies and gentlemen. 20 Will the court reporter please 21 swear in the witness, after which we can begin. 22 Whereupon-- 23 24 JOHN C. BEYER, Ph.D.</p>	<p style="text-align: right;">Page 8</p> <p>1 was marked for identification.) 2 BY MR. KUNEY: 3 Q. Dr. Beyer, you have Defendant's 4 Exhibit 407 in front of you? 5 A. I do. 6 Q. And is that a copy of the report 7 you've submitted regarding Class certification 8 in this matter? 9 A. It is. 10 Q. And is there -- before we get 11 started, anything in the report that since you 12 submitted it you would like to amend or correct? 13 A. There's only one thing. I noticed 14 in preparing for this deposition that footnote 15 55 inadvertently cites an incorrect source, and 16 that is on page 22, and the source should be the 17 Complaint, paragraph 73. 18 Q. Complaint, paragraph 73? 19 A. Yes. 20 Q. Okay. Is that it in terms of 21 corrections that you would like to make before 22 we get started? 23 A. It is. 24 Q. Dr. Beyer, would you turn to the</p>
<p style="text-align: right;">Page 7</p> <p>1 a witness, called for examination, having been 2 first duly sworn, was examined and testified as 3 follows: 4 5 EXAMINATION 6 7 BY MR. KUNEY: 8 Q. Could you state your name, please? 9 A. John C. Beyer. 10 Q. Dr. Beyer, my name is Steve KuneY. 11 I know you've been through this deposition 12 process a number of times before. I'm not going 13 to bother with a lengthy reminder of the rules, 14 except for one, which is if I ask a question you 15 don't understand, please ask me to clarify and 16 I'll do the best I can to make sure that you 17 understand the question before you answer. Is 18 that acceptable? 19 A. Yes, it is. 20 MR. KUNEY: I understand we are 21 about to be on Defendant's Exhibit Number 407. 22 I would like to have Dr. Beyer's report marked 23 as 407, please. 24 (Defendant's Exhibit Number 407</p>	<p style="text-align: right;">Page 9</p> <p>1 section of your report that begins at the bottom 2 of page 44, entitled, Feasibility of Assessing 3 Damages on a Class-Wide Basis. 4 For purposes of this section of 5 your report are you -- were you assuming that 6 Defendant's conduct was anticompetitive in the 7 manner that the Plaintiffs alleged? 8 A. Yes. In fact, for both the impact 9 analysis and for the assessment of damage 10 methodologies, as I state in my report, I've 11 assumed that the allegations in the Complaint 12 are true. 13 Q. Did you make any use of any of 14 these damages methodologies as part of reaching 15 the conclusion that you could assess liability 16 on a class-wide basis? 17 A. First, I have not been asked to do 18 that and I would have -- I have not in 19 circumstance of previous cases used damage 20 methodologies as a means of -- in economic terms 21 of demonstrating that liability or the 22 anticompetitive conduct occurred. 23 Q. Are you proposing this morning 24 that any of your damages methodologies could be</p>

<p style="text-align: right;">Page 10</p> <p>1 used to assess whether there was liability on a</p> <p>2 class-wide basis?</p> <p>3 A. I'm not.</p> <p>4 Q. So this is just the damages part</p> <p>5 of your report and we can treat it as such?</p> <p>6 A. As the title says it is.</p> <p>7 Q. Take a look if you would to</p> <p>8 paragraph 93. It's on page 47.</p> <p>9 Why does -- looking at your first</p> <p>10 sentence, why does economic theory suggest that</p> <p>11 an equilibrium should exist between the price</p> <p>12 processors in the Southeast are willing to pay</p> <p>13 for milk produced in Orders 5 and 7 and the</p> <p>14 price processors would have to pay to purchase</p> <p>15 milk from outside Orders 5 and 7, plus charges</p> <p>16 for transportation?</p> <p>17 A. In an unfettered market the basic</p> <p>18 theorems of economics state that the pricing</p> <p>19 system will lead to an equilibrium between the</p> <p>20 quantity demanded and the quantity supplied, and</p> <p>21 that's all that is stated here.</p> <p>22 Q. Is it your assumption in this</p> <p>23 first proposed methodology that if processors</p> <p>24 thought the price for milk produced in Orders 5</p>	<p style="text-align: right;">Page 12</p> <p>1 If they had, in fact, had a choice</p> <p>2 they might have looked to others, other areas,</p> <p>3 other alternatives to take the least cost</p> <p>4 alternative.</p> <p>5 Q. Is it your understanding of the</p> <p>6 allegations in the Complaint that processors</p> <p>7 were prohibited by some contract they had</p> <p>8 entered into from buying milk from outside</p> <p>9 Orders 5 and 7 if they found it to be lower cost</p> <p>10 than milk from within the Orders?</p> <p>11 A. The Defendant processors were</p> <p>12 under contract most -- as far as I could tell,</p> <p>13 to procure their milk under full supply</p> <p>14 agreements from DFA, or other sources, DMS, for</p> <p>15 example, and to the extent that that occurred</p> <p>16 they did not have alternatives to choose from</p> <p>17 other than the organization, DFA, DMS, who were</p> <p>18 providing the full supply of that processors.</p> <p>19 Q. As you understood or understand</p> <p>20 those full supply did they prohibit Dean from</p> <p>21 buying milk from outside Orders 5 and 7 if it</p> <p>22 could find such milk at a lower price than DFA</p> <p>23 was offering?</p> <p>24 A. Effectively, yes, because they</p>
<p style="text-align: right;">Page 11</p> <p>1 and 7 was too high that they could turn to milk</p> <p>2 from outside those orders as an alternative?</p> <p>3 A. They could in a hypothetical</p> <p>4 situation, but what this is really suggesting,</p> <p>5 this economic theorem, is that, again, in an</p> <p>6 unfettered marketplace that a processor or</p> <p>7 handler would have a choice in securing milk</p> <p>8 from the least cost source and would look to</p> <p>9 those least cost sources, whether they be</p> <p>10 domestically procured or from outside the</p> <p>11 Orders.</p> <p>12 Q. Have you investigated the question</p> <p>13 of whether during the Class period processors</p> <p>14 located within Orders 5 and 7 did, in fact, turn</p> <p>15 to what they considered to be lower cost milk</p> <p>16 from outside?</p> <p>17 A. During the Class period with the</p> <p>18 data I've looked at processors did not have a</p> <p>19 choice. By and large the processors were under</p> <p>20 contracts, at least the processors who</p> <p>21 collectively, jointly had market power in Orders</p> <p>22 5 and 7, were able to -- they had no choice.</p> <p>23 They didn't choose between one alternative and</p> <p>24 another.</p>	<p style="text-align: right;">Page 13</p> <p>1 looked -- their contractual arrangements, for</p> <p>2 example, a processor in that full supply</p> <p>3 agreement with DFA needed to, unless it was</p> <p>4 going to change that contract, buy all of its</p> <p>5 Grade A raw milk from DFA. Where DFA procured</p> <p>6 that milk was a different matter, but they</p> <p>7 needed to procure it from DFA.</p> <p>8 Furthermore, most of these</p> <p>9 contracts that I have seen, I haven't seen all</p> <p>10 of them, provided for a -- an MFN clause so that</p> <p>11 if DFA were, for example, to offer milk from an</p> <p>12 outside source at a lower price that it would</p> <p>13 then be required under these provisions to</p> <p>14 sell -- if that became known, to extend that</p> <p>15 price to all processors.</p> <p>16 Q. Let me try to be clearer about my</p> <p>17 question.</p> <p>18 Is it your understanding that the</p> <p>19 full supply agreement between Dean and DFA</p> <p>20 prohibited Dean from going outside Orders 5 and</p> <p>21 7 and outside DFA to procure cheaper milk if it</p> <p>22 could find it?</p> <p>23 A. Where Dean had the full supply</p> <p>24 agreement with DFA my understanding is they did</p>

<p style="text-align: right;">Page 14</p> <p>1 not have that option. They had to purchase milk 2 from DFA. 3 Q. Have you investigated whether 4 there were occasions when, notwithstanding the 5 full supply agreement, Dean went outside Orders 6 5 and 7 to procure milk that it believed it 7 could obtain cheaper than DFA was offering? 8 A. I've not done systematic analysis 9 of that. I've looked at invoices that both Dean 10 and DFA have provided, but not on a systematic 11 basis. 12 Q. Well, putting aside systematic, 13 are you aware of anecdote information that on 14 occasion Dean went outside of Orders 5 and 7 to 15 procure milk from people other than DFA when it 16 believed it could find that milk more cheaply? 17 A. I'm not aware of that. 18 Q. And it's your understanding that 19 the full supply agreement wouldn't permit that 20 conduct; is that correct? 21 MR. BROOKHISER: Objection, asked 22 and answered. 23 THE WITNESS: That's correct. 24 BY MR. KUNEY:</p>	<p style="text-align: right;">Page 16</p> <p>1 A. Well, there weren't actual 2 transactions for Orders 5 -- processors in 3 Orders 5 and 7 that did follow the least cost 4 acquisition, so -- 5 Q. Or at least there's none that you 6 know of? 7 A. Not enough to systematically 8 fulfill the requirements of Orders 5 and 7, 9 consumption and demand. But, nonetheless, it 10 would be based upon the acquisition cost in a 11 particular area outside of 5 and 7. That would 12 be the actual price at which milk in a given 13 time period was procured, given the hauling and 14 mileage rate from that point of acquisition. 15 Q. Is P*LOCAL, if you were using your 16 first methodology, is P*LOCAL a number that could 17 be estimated, or an array of numbers? 18 A. Well, here it is intended to be a 19 representative formula way of expressing it. 20 All this is saying is that in an unfettered 21 marketplace the price of imports would be the 22 cost of acquisition in the least -- the lowest 23 cost alternative available to the processor at 24 that point in time, plus the hauling cost and</p>
<p style="text-align: right;">Page 15</p> <p>1 Q. When you look to your formula, if 2 I may call it that, just below paragraph 93, 3 PLOCAL equals P*LOCAL, where P*LOCAL equals PIMPORT plus 4 hauling cost, times mileage. Do you see that? 5 A. Yes. 6 MR. BROOKHISER: Paragraph 93? 7 MR. KUNEY: Just below -- I guess 8 it's in the middle of paragraph 93. 9 BY MR. KUNEY: 10 Q. Is PIMPORT meant to represent the 11 lowest price at which processors could procure 12 milk from outside Orders 5 and 7? 13 A. No. It would depend -- if you 14 wanted to look at the lowest price one could, 15 but there would probably be an array of prices 16 that would be milk procured from outside and it 17 is -- it is the sum of those prices that would 18 provide -- at a given time, whether it be a year 19 or a quarter, would provide a weighted average 20 of what that price would be. 21 Q. And would you look for actual 22 transactions in order to determine what P*LOCAL 23 should be if you were going to implement this 24 first methodology?</p>	<p style="text-align: right;">Page 17</p> <p>1 the mileage from that point to the processing. 2 And the P* -- the local price is the price that 3 would be prevailing in the marketplace, domestic 4 production. 5 Q. And how would you propose, if you 6 were going to utilize this first methodology, 7 for example, for 2003, to go back and 8 reconstruct what P*LOCAL should be? 9 A. P*LOCAL is -- would be the actual 10 price that a given set of processors would be 11 paying for milk that is produced domestically. 12 The question is where does -- 13 where would, in this particular methodology, 14 would the processors acquire the incremental 15 milk that they needed to satisfy their 16 requirements. And the difference between what 17 was done and what would be done is a measure of 18 damages. 19 Q. I think I understand that. I'm 20 just trying to understand how I would 21 operationalize, if I might, this methodology. 22 So, 2003 is a year within the Class period. We 23 can agree on that, I take it? 24 A. Yes.</p>

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<p>1 Q. And you have told us that you</p> <p>2 don't believe there were actual transactions</p> <p>3 whereby processors brought milk in from the</p> <p>4 outside, apart from DFA or a DFA related entity.</p> <p>5 That's correct; isn't it?</p> <p>6 A. Well, if there were and you're</p> <p>7 implying in your question that there were, there</p> <p>8 were so few that they would not represent a</p> <p>9 requirement, a basis on which to estimate prices</p> <p>10 for a period.</p> <p>11 Q. So from going back in time to</p> <p>12 2003, and if I don't have transactions or enough</p> <p>13 actual transactions to develop P*LOCAL, what data</p> <p>14 would I look at in order to implement this first</p> <p>15 proposed methodology?</p> <p>16 A. P*LOCAL would be -- and in various</p> <p>17 methods, Mr. Baird used some, Mr. Sims used</p> <p>18 some, it could be done on a systematic basis</p> <p>19 through a linear programming model to identify</p> <p>20 the 9, 10, or 12 potential sources of</p> <p>21 acquisition, and through that linear programming</p> <p>22 model find the quantity of milk that is acquired</p> <p>23 outside of Orders 5 and 7, and the price at</p> <p>24 which it is acquired that would represent the</p>	<p>1 come from DFA and DMS, but I would also look</p> <p>2 toward, if I were doing it, I'm not sure I would</p> <p>3 be doing it, I would look toward other sources</p> <p>4 of information, for example, Mr. Sims did this.</p> <p>5 In fact, it may well turn out that some of the</p> <p>6 sources, although he did it for a particular</p> <p>7 point in time, I think it was 2003, if I'm not</p> <p>8 mistaken, but would serve as a starting point to</p> <p>9 analyze where are places, geographic areas,</p> <p>10 where milk could be procured by the processors</p> <p>11 of Orders 5 and 7 and identify with the data</p> <p>12 that exists what it cost to buy that milk and</p> <p>13 what it cost to bring it to a given set of</p> <p>14 processors, the hauling and mileage rate.</p> <p>15 Q. Let's say, for example, you sited</p> <p>16 that Ohio was a place outside Orders 5 and 7</p> <p>17 where there might be milk available for purposes</p> <p>18 of your PIMPORT variable. How would you determine</p> <p>19 today the price at which, in what you call an</p> <p>20 unfettered market, processors in the Southeast</p> <p>21 could have bought some quantity of milk from</p> <p>22 Ohio in 2003?</p> <p>23 A. The actual prices?</p> <p>24 What is unfettered in this</p>
Page 19	Page 21
<p>1 actual prices, the actual hauling rate, and the</p> <p>2 mileage involved.</p> <p>3 Or, in the absence of a linear</p> <p>4 programming it could be done -- I'm calling it</p> <p>5 manually, but it would be done with computerized</p> <p>6 tools where selected sources of acquisition that</p> <p>7 were probably used in part in the actual</p> <p>8 procurement during say 2003, would serve as a</p> <p>9 basis of identifying acquisition for all</p> <p>10 requirements and the cost of acquisition and</p> <p>11 then compare that cost of acquisition, this is</p> <p>12 in a but-for setting, to the actual cost of</p> <p>13 acquisition. It could be expressed ultimately</p> <p>14 in a weighted average price that the processors</p> <p>15 would have paid and the actual price the</p> <p>16 processors did pay.</p> <p>17 Q. What data would you use if you</p> <p>18 were trying to actually implement this</p> <p>19 methodology to identify the 9, 10, 12 potential</p> <p>20 least cost sources of milk for outside Orders 5</p> <p>21 and 7?</p> <p>22 A. I would use much of the data that</p> <p>23 has been produced thus far and which is a</p> <p>24 combination of the sources of information that</p>	<p>1 methodology is that processors have a choice of</p> <p>2 where they purchase the milk outside of Orders 5</p> <p>3 and 7, and by my judgment they did not have</p> <p>4 that, from what I've seen, by and large, they</p> <p>5 didn't have that choice during much of the Class</p> <p>6 period.</p> <p>7 Q. Understood.</p> <p>8 A. So the surplus milk would be in</p> <p>9 line -- or the milk for acquisition would be in</p> <p>10 line with for each of the years, what was being</p> <p>11 produced, the prices at the point that were in</p> <p>12 place at the time, actual prices at which milk</p> <p>13 was being procured and sold in Ohio to</p> <p>14 processors, and then the question of hauling and</p> <p>15 mileage from that point of acquisition would be</p> <p>16 applied, also.</p> <p>17 Q. Is it your understanding that data</p> <p>18 has already been produced in this case that</p> <p>19 would give you a price at which processors were</p> <p>20 acquiring milk in Ohio, for example, in 2003 or</p> <p>21 2004?</p> <p>22 A. There was -- there is some data</p> <p>23 that, although I have not -- again, examined</p> <p>24 this data systematically, but there is some data</p>

<p style="text-align: right;">Page 22</p> <p>1 whereby DFA, for example, was able -- did, to 2 meet its contractual requirements, procure milk 3 from outside in areas, Indiana, Ohio, 4 Pennsylvania, a variety of sources, and this is 5 in effect replicating for the totality of the 6 requirements the acquisition costs of milk. If, 7 in fact, looking at the marketplace as it 8 existed, minus the alleged anticompetitive 9 behavior, whether milk for Orders 5 and 7 could 10 be procured at a lower cost. That is not just 11 the milk itself, but the transportation of the 12 milk to the point that it is going to be used. 13 Q. So are you saying that at least in 14 part you could use actual data from DFA's 15 purchases of milk from outside Orders 5 and 7 in 16 order to determine what processors could have 17 paid in this unfettered market, had they gone 18 outside Orders 5 and 7, themselves, to buy that 19 milk? 20 A. That would be one source. DFA 21 would be one source of information. 22 Q. Is the -- is the P*LOCAL that you're 23 talking about the same for every plant in the 24 Southeast?</p>	<p style="text-align: right;">Page 24</p> <p>1 plant is closer to a source of raw milk. 2 Q. So if I'm understanding you, we 3 have to identify these alternative sources and 4 perhaps do this linear programming model for 5 each of the plants in the Southeast, because 6 they won't all have the same least cost 7 alternative sources from outside Orders 5 and 7? 8 A. No, we would not need to do it for 9 each plant. A linear programming model or even 10 if it's done manually, although computer 11 technology would be involved, would be to 12 include a number of processing plants that would 13 serve as the point of acquisition for Orders 5 14 and 7. 15 Q. Well, why wouldn't you have to use 16 each plant if you were going to determine what 17 each plant's alternative was in this unfettered 18 market, in your hypothesis? 19 A. Because you changed the objective 20 in your question. You said, each plant's cost 21 of acquisition. It is not each plant, it's 22 Orders 5 and 7. 23 In this whole area what is the 24 cost of acquiring the supplemental or the</p>
<p style="text-align: right;">Page 23</p> <p>1 A. No. It probably would vary, 2 obviously, because each location has a different 3 mileage dimension from the alternative sources. 4 Q. Okay. And there might even be 5 different sources that were the most sensible 6 source of outside milk, depending on whether the 7 plant is in Arkansas, for example, as opposed to 8 Virginia? 9 A. That's correct. Let me -- excuse 10 me. If a linear programming model is used, part 11 of the process would be to -- because each plant 12 has certain areas to which it -- for each 13 processor, areas to which it is better situated 14 in terms of the transportation cost of moving 15 that raw milk and a linear programming model is 16 able to take into account all of the costs that 17 a given processor would have to pay for milk 18 from a given location outside of Orders 5 and 7. 19 It may be that -- let me just 20 hypothetically, a plant may be located closer to 21 a source of milk which is priced higher and, 22 therefore, the distance and geography does not 23 necessarily mean that the cost of acquisition is 24 thereby lowered simply because it is closer, the</p>	<p style="text-align: right;">Page 25</p> <p>1 imported milk, and you can look at that issue. 2 It doesn't matter whether I've 3 answered that question for each and every plant. 4 The question is answering it for 4, 5, and 7 in 5 its entirety. 6 Q. And explain how you answer it for 7 Orders 5, and 7 in its entirety without, as a 8 step first, answering it for each individual 9 plant? 10 A. Because in -- first report, as 11 part of the process, one would include, 12 hypothetically, five processing plants that are 13 the likely recipients of this incremental amount 14 of imports. That can all be looked at in one 15 analytical process, not each of those processing 16 plants sequentially. 17 In fact, it may turn out that if 18 you were to look at each of those plants 19 incrementally, processing facilities, that you 20 could end up with a solution or a cost which is 21 low for that plant, but when examined in the 22 context of alternatives for the other five 23 plants or the four plants, in this case, might 24 yield, because there's some interaction between</p>

<p style="text-align: right;">Page 26</p> <p>1 these plants where they get their source of</p> <p>2 supply.</p> <p>3 Q. Why not just pick one plant in the</p> <p>4 Southeast and use that as the basis in this</p> <p>5 first methodology for the determination of</p> <p>6 P*LOCAL?</p> <p>7 A. I would not do that. It doesn't</p> <p>8 give you -- to me it answers a question only</p> <p>9 which someone that has a curiosity to understand</p> <p>10 this processing plant, where would it otherwise</p> <p>11 in an unfettered market acquire its milk and</p> <p>12 what's the cost of doing so, compared to where</p> <p>13 it did.</p> <p>14 That doesn't carry us very far,</p> <p>15 and if it involves some additional work, then as</p> <p>16 an economist I'm not sure that there is any</p> <p>17 benefit in doing it for that single plant.</p> <p>18 Q. So you're not telling us you would</p> <p>19 take one plant and use that for purposes of this</p> <p>20 methodology as representative of the entire area</p> <p>21 covered by Orders 5 and 7?</p> <p>22 A. I wouldn't.</p> <p>23 Q. How would you know how many plants</p> <p>24 you would have to do in order to represent the</p>	<p style="text-align: right;">Page 28</p> <p>1 are the outer range of Orders 5 and 7. How many</p> <p>2 that would be, I don't know at this point, but</p> <p>3 that's the empirical question, but it can be</p> <p>4 easily and readily determined.</p> <p>5 Q. In looking for what you've called</p> <p>6 the representative sample, what criteria would</p> <p>7 you be looking at, other than the distance from</p> <p>8 outside sources of milk?</p> <p>9 A. I've indicated, two, that the</p> <p>10 spatial dimension is one, because that affects</p> <p>11 mileage, the hauling cost and mileage.</p> <p>12 It also affects -- the other it is</p> <p>13 the location of processing plants near large</p> <p>14 centers of demand. And to a certain extent</p> <p>15 processing facilities have been so located.</p> <p>16 So there are two criteria that I</p> <p>17 would use at the outset for that.</p> <p>18 Q. Would you want a mix of how close</p> <p>19 the processing plants were to the sources of</p> <p>20 demand? Is that what you're saying?</p> <p>21 A. In part, yes. It would be</p> <p>22 inappropriate to take processing plants -- this</p> <p>23 is a single processing plant. It would be</p> <p>24 inappropriate to take all processing plants that</p>
<p style="text-align: right;">Page 27</p> <p>1 entire area covered by Orders 5 and 7?</p> <p>2 A. That is part of the implementation</p> <p>3 of the methodology that, as far as I'm</p> <p>4 concerned, would be done at the next stage.</p> <p>5 Q. Well, just help me out and tell me</p> <p>6 when you were going through it without -- I know</p> <p>7 you don't have the data in front of you, I'm not</p> <p>8 asking that. A method question. As you look at</p> <p>9 the results of this methodology how do you know</p> <p>10 when you stop and say, okay, I've got enough</p> <p>11 plants. I've now got a good representation of</p> <p>12 the entire area covered by Orders 5 and 7?</p> <p>13 A. Well, you call it a method</p> <p>14 question, the current question, but</p> <p>15 hypothetically I could describe it to you, let's</p> <p>16 say there are 40 plants throughout Class 1</p> <p>17 bottling processing plants in Orders 5 and 7.</p> <p>18 It's changed over time, obviously, but let's use</p> <p>19 that as a hypothetical.</p> <p>20 I might well be able to</p> <p>21 identify -- once I see what the location,</p> <p>22 spatially, and demand I probably would select</p> <p>23 a -- what I would call a representative sample</p> <p>24 of those that are most distant and those that</p>	<p style="text-align: right;">Page 29</p> <p>1 are in proximity to the borders of 5 and 7,</p> <p>2 because that does not necessarily meet all of</p> <p>3 the key needs of demand in Orders 5 and 7.</p> <p>4 So I think you need -- one needs</p> <p>5 in looking at the number of processing plants,</p> <p>6 those that are affected by demand and where they</p> <p>7 are located, as well as others that are near the</p> <p>8 outer reaches of Orders 5 and 7.</p> <p>9 Q. Would, if we were trying to</p> <p>10 implement your first methodology, would PLOCAL be</p> <p>11 the same for each plant that we would include in</p> <p>12 this representative sample?</p> <p>13 A. No, it would not, but the reason</p> <p>14 for looking at a set of plants rather than a</p> <p>15 single plant is that it becomes a weighted</p> <p>16 average of the plants that are included in the</p> <p>17 problem set, and weighted average simply means</p> <p>18 pounds of milk imported and the price at which</p> <p>19 it is acquired, which is at the source of supply</p> <p>20 plus the mileage and so forth, and that is going</p> <p>21 to vary for a given plant. It's going to vary</p> <p>22 over time for that plant and it's going to vary</p> <p>23 in a given point in time for the number of</p> <p>24 plants that are included in this -- in this set</p>

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<p>1 of plants for which acquisition costs are going 2 to be determined.</p> <p>3 Q. And if we're -- we tried to use 4 this first methodology and we got this 5 representative sample that you've been 6 describing, at the end of the process would we 7 be looking for the difference between PLOCAL and 8 P*LOCAL; is that correct?</p> <p>9 A. Yes, but I would put it so that 10 you don't end up with a necessarily negative 11 number, yes.</p> <p>12 P*LOCAL, which in effect is the 13 but-for acquisition cost -- price, minus the 14 actual price of acquisition.</p> <p>15 Q. That difference would be a measure 16 of the undercharge in using this first method; 17 is that correct?</p> <p>18 A. Yes, it's a partial measure.</p> <p>19 Q. What would be missing to make it 20 an actual measure?</p> <p>21 A. Because it only deals with 22 acquisition. This is one methodology.</p> <p>23 Q. I understand, but even to finish 24 that methodology are there some other steps that</p>	<p>1 Q. And is that the way it works today 2 in Orders 5 and 7, as you understand it?</p> <p>3 A. Well, with SMA it's important to 4 understand this, the institutional and pricing 5 system, which I know you do, well, but SMA, 6 which is a starting point for all of the 7 cooperatives in Orders 5 and 7, or nearly all, 8 and we get to the relationship for independence 9 through DMS. The cost of cooperative milk 10 procured by the various -- regardless of where 11 it's procured from, is affected -- finds itself 12 in the SMA, either the cost or the revenues in 13 SMA and, therefore, the blended price, which SMA 14 sets and is a basis on which various 15 cooperatives who are members of SMA and, in 16 turn, DMS price, that is the mechanism by which 17 the additional -- the saved acquisition costs 18 are reflected.</p> <p>19 Q. Based on your investigation of the 20 marketplace to date is it your understanding 21 that all of the co-ops who are members of SMA 22 use the same methodology in determining what the 23 pay price for their farmer members will be?</p> <p>24 A. No, they do not, but they start</p>
Page 31	Page 33
<p>1 we have to take once we had that undercharge 2 calculation?</p> <p>3 A. No. This is one methodology.</p> <p>4 Q. Well, how would we -- the 5 undercharge that you would calculate here, as I 6 understand it, is an undercharge in what the 7 processors pay for milk; is that correct?</p> <p>8 A. You turn it around. It's an 9 undercharge that farmers would have received, 10 but did not.</p> <p>11 Q. In proposing this method are you 12 positing that if you calculated a dollar 13 undercharge in what the processors paid for milk 14 that would translate into a dollar less than the 15 farmers received?</p> <p>16 A. Yes, by the nature of the way in 17 which prices have been and are determined in 18 Orders 5 and 7.</p> <p>19 Q. So dollar in the door -- \$1 less 20 in the door from processes in this model, in 21 this methodology, means \$1 less out the door to 22 farmers; is that right?</p> <p>23 A. That's how it would be translated, 24 yes.</p>	<p>1 with SMA blended price. They can't -- the 2 blended price specified by SMA, which applies to 3 five or six other cooperatives, it is exactly 4 that starting point.</p> <p>5 Q. Would there be any difference, as 6 you understand it, if there were -- if there 7 were a dollar less paid by processors as a 8 result of the conduct and how much of that 9 dollar got through to the Lone Star member as 10 opposed to a DFA member?</p> <p>11 A. That's an interesting question -- 12 well, the reason I'm talking about pass-thru, 13 the way of pass-thru is because of pricing 14 mechanisms that are in place now in -- with the 15 allegations of the Plaintiffs.</p> <p>16 In a but-for environment, absent 17 these various allegations, if there is a savings 18 of -- by the principal cooperatives who deal 19 with dairy farmers, in Orders 5 and 7 of 20 X amount, that's paid by processors, saved by 21 processors, is therefore resources that are 22 available for the various cooperatives who would 23 be serving the processors to pass-thru on a 24 patronage basis to their farmers as they do</p>

<p style="text-align: right;">Page 34</p> <p>1 with, increased cost, decreased cost, increased 2 revenue, increased service and have. 3 Q. So if there's an extra dollar 4 available to DFA and to Lone Star is it your 5 view in trying to implement this methodology to 6 estimate impact on the farmers that that extra 7 dollar to a DFA member -- excuse me, that extra 8 dollar to DFA would have the same consequence 9 for a member of DFA as an extra dollar to Lone 10 Star would have to a Lone Star member? 11 A. Lone Star -- right now Lone Star 12 is a question for me because we don't have data 13 from Lone Star to identify whether any or if 14 there are some who are members of the Class. 15 Lone Star is part of SMA. In a 16 but-for environment SMA would not exist, or at 17 least not in its present form, most likely, and 18 the question of Lone Star's relationship with 19 processors would be part of calculating what the 20 cost of acquisition of milk would be in an 21 unfettered market. 22 So whether -- I can't answer the 23 question on Lone Star, because I don't have the 24 data.</p>	<p style="text-align: right;">Page 36</p> <p>1 judgment the undercharge would apply equally to 2 all dairy farmers, not necessarily to the 3 cooperatives involved, but to the dairy farmers 4 who are members of the Class. 5 Q. So just to make sure I understood 6 this point, it wouldn't make any difference to 7 you in applying this first methodology what 8 particular co-op a dairy farmer happened to be a 9 member of during the Class period? 10 A. No. 11 Q. So what you said a few minutes ago 12 about you couldn't answer for Lone Star because 13 you didn't have the data? 14 A. I don't know -- excuse me for 15 interrupting. 16 It is not clear that Lone Star has 17 any members who are -- any members of its 18 cooperative who are members of the Class. 19 Q. Is that the only thing for which 20 you would need Lone Star data before you would 21 be prepared to conclude that the effect of the 22 undercharge on the dollars that reached farmers 23 would be the same for Lone Star members as it 24 would be for DFA members?</p>
<p style="text-align: right;">Page 35</p> <p>1 Q. Can you answer the question with 2 respect to Maryland & Virginia? If the 3 processors paid an extra dollar would the 4 consequence for a farmer member of Maryland & 5 Virginia be the same as the consequence for a 6 farmer member of DFA if we were trying to 7 implement here first methodology? 8 A. For that segment, Maryland & 9 Virginia, who are members of the Class, in other 10 words, members of the Class are dairy farmers 11 who produce milk in 5 and 7 and sell their milk 12 in 5 and 7. 13 Q. It would be the same? 14 A. Yes. 15 Q. And how do you know that? 16 A. Because the pricing systems that 17 are -- how do I know that? 18 Q. Yeah. 19 A. Because we're dealing with a 20 hypothetical, but it -- the pricing systems as 21 they have existed all begin with a uniform 22 pricing system and it goes up or down, depending 23 upon various events, circumstances and 24 institutional arrangements. Therefore, in my</p>	<p style="text-align: right;">Page 37</p> <p>1 A. Let's just make it very clear. 2 The damages in this methodology, 3 indeed, in all three of the methodologies that I 4 set out, would be ultimately addressed, 5 calculated probably in hundred -- the difference 6 in hundred weight price, per hundred weight. 7 For all dairy farmers who are members of the 8 Class, regardless of what cooperative they 9 belong to, independents, whether they are DMS, 10 or those very few farmers who may not be part of 11 any of those institutions. 12 Q. I understand you think that, 13 Dr. Beyer, and that's the opinion you expressed 14 in your report. I'm just trying to understand 15 how you got there. 16 So I just want to be clear, if I 17 can, that in your view if we use methodology one 18 and somehow calculate an undercharge for the 19 areas covered by Orders 5 and 7, that to you it 20 would make no difference in terms of the impact 21 on an actual dairy farmer what co-op they had 22 belonged to during the Class period or even 23 whether they belonged to a co-op during the 24 Class period. Am I understanding you correctly?</p>

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<p>1 A. That's correct.</p> <p>2 Q. And would it make any difference</p> <p>3 whether they were a DMS shipper during the Class</p> <p>4 period if we were trying to actually implement</p> <p>5 your first proposed methodology?</p> <p>6 A. No.</p> <p>7 Q. Would it make any difference if</p> <p>8 they were -- you've heard the expression Dean</p> <p>9 Direct?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. So would it make any</p> <p>12 difference if they were Dean Direct?</p> <p>13 A. No.</p> <p>14 Q. Would it make any difference if</p> <p>15 they were an independent supplying milk to Dairy</p> <p>16 Fresh?</p> <p>17 A. No.</p> <p>18 Q. Would it make any difference if</p> <p>19 they were a member of Cobblestone? You've heard</p> <p>20 of the Cobblestone Cooperative?</p> <p>21 A. Very small one, yes, in Virginia.</p> <p>22 Q. Would it make any difference if</p> <p>23 they were a member of Cobblestone?</p> <p>24 A. No. If the dairy farmer of</p>	<p>1 particularly in terms of an unfettered market,</p> <p>2 the cooperatives would not be able to pay a</p> <p>3 better price to the producers through the</p> <p>4 cooperatives without also recognizing that that</p> <p>5 price has to apply, as well, to the</p> <p>6 independents, or there would be a form of</p> <p>7 arbitrage that would be, to use a word that is</p> <p>8 bandied about frequently, destabilization in the</p> <p>9 market. But everything that I have looked at in</p> <p>10 this marketplace tells me that in the end the</p> <p>11 pricing of milk is done in a way -- whether</p> <p>12 through a cooperative or DMS, in a way in which</p> <p>13 the effect of higher or lower costs, higher or</p> <p>14 lower revenue, gets expressed in a dollars per</p> <p>15 hundred weight.</p> <p>16 And what I have seen, and this is</p> <p>17 reflected throughout my report, what I have seen</p> <p>18 in looking over time is that the pricing systems</p> <p>19 result in very similar outcomes under the actual</p> <p>20 environment, therefore the hundred weight, the</p> <p>21 common measure, the one that is used by</p> <p>22 everyone, this reduced cost would be reflected</p> <p>23 in -- in my judgment, we can call it an</p> <p>24 undercharge, but it would be in effect a set of</p>
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<p>1 Cobblestone is a Class member, no.</p> <p>2 Q. You've heard of a co-op called</p> <p>3 SMI?</p> <p>4 A. Yes.</p> <p>5 Q. Would it make any difference in</p> <p>6 applying the first methodology if the farmer was</p> <p>7 a member of SMI?</p> <p>8 A. If the farmer is a member of the</p> <p>9 Class it doesn't matter what the institutional</p> <p>10 arrangement is.</p> <p>11 Q. That's because, as you understand</p> <p>12 it, the undercharge from the processor</p> <p>13 historically has had the same effect on the mail</p> <p>14 box check of every farmer in the Southeast,</p> <p>15 without regard to whether they're in DFA, Lone</p> <p>16 Star, Maryland & Virginia, DMS, Cobblestone or</p> <p>17 SMI?</p> <p>18 A. No. No.</p> <p>19 MR. BROOKHISER: Objection, asked</p> <p>20 and answered.</p> <p>21 THE WITNESS: And I stated this in</p> <p>22 my report. It's on the next page. Number 1,</p> <p>23 the difference between DMS, Dean Direct, other</p> <p>24 independents, the way systems operate, and</p>	<p>1 resources not currently available that would be</p> <p>2 available in the but-for environment.</p> <p>3 BY MR. KUNEY:</p> <p>4 Q. And that you believe would have</p> <p>5 been available historically but-for the alleged</p> <p>6 conduct?</p> <p>7 A. Given this dimension, yes.</p> <p>8 Q. So am I understanding this piece</p> <p>9 of this first methodology, that the mail box</p> <p>10 price actually received by farmers, depending on</p> <p>11 what particular organization they belong to, is</p> <p>12 not something that you need to put into your</p> <p>13 calculations?</p> <p>14 A. The difference between --</p> <p>15 ultimately, the difference between the estimated</p> <p>16 cost of acquisition in an unfettered market, the</p> <p>17 but-for, and what was actually the case,</p> <p>18 acquisition of imports, let's assume that there</p> <p>19 is a difference, that can be -- those are</p> <p>20 resources that would not otherwise be incurred</p> <p>21 and that difference would be -- would take the</p> <p>22 form of an undercharge per hundred weight for</p> <p>23 all dairy farmers or it would be a sum of</p> <p>24 resources that are saved for the Class as a</p>

<p style="text-align: right;">Page 42</p> <p>1 whole.</p> <p>2 Q. Am I correct that as I go through</p> <p>3 the first methodology that you propose I don't</p> <p>4 need to introduce any data on the actual mail</p> <p>5 box price received by any farmer in the</p> <p>6 Southeast?</p> <p>7 A. That's correct.</p> <p>8 Q. I don't need to be concerned about</p> <p>9 differences in mail box prices between, for</p> <p>10 example, DFA members and DFA shippers. I don't</p> <p>11 need to be concerned about that in using your</p> <p>12 methodology?</p> <p>13 A. No.</p> <p>14 Q. I don't need to be concerned about</p> <p>15 differences in mail box prices between DFA</p> <p>16 members and members of SMI, to the extent that</p> <p>17 members -- I don't need to worry about that</p> <p>18 either?</p> <p>19 A. No.</p> <p>20 Q. If -- if a processor had -- let me</p> <p>21 back up.</p> <p>22 As you used the terminology, is it</p> <p>23 possible for a processor to lawfully acquire</p> <p>24 monopsony power?</p>	<p style="text-align: right;">Page 44</p> <p>1 methodology a measure of the monopsony</p> <p>2 undercharge?</p> <p>3 A. Yes.</p> <p>4 Q. So could a lawful monopsonist</p> <p>5 benefit from an undercharge?</p> <p>6 A. Yes, but not in this way.</p> <p>7 The reality -- as soon as you make</p> <p>8 it a lawful monopsony the range of potential</p> <p>9 options for the monopsonist is to maximize its</p> <p>10 profit, and if it's operating by itself it may</p> <p>11 not have options, alternative courses of action,</p> <p>12 which it does have -- which actually did occur,</p> <p>13 according to the Complaint, requiring other</p> <p>14 institutions, other actors, to support the</p> <p>15 pricing in this case of imports from --</p> <p>16 Q. Is it your understanding that</p> <p>17 there are no allegations in this place -- in</p> <p>18 this case about the unilateral exercise of</p> <p>19 monopsony power?</p> <p>20 A. You're going to have to explain</p> <p>21 that question. It's a loaded --</p> <p>22 Unilateral -- who is the</p> <p>23 monopsonist in your question?</p> <p>24 Q. Well, I assumed from reading your</p>
<p style="text-align: right;">Page 43</p> <p>1 A. In theory.</p> <p>2 MR. BROOKHISER: I object to that</p> <p>3 legal conclusion.</p> <p>4 THE WITNESS: Yes.</p> <p>5 BY MR. KUNEY:</p> <p>6 Q. Yes, it's possible?</p> <p>7 A. Yes.</p> <p>8 Q. And if a processor lawfully</p> <p>9 acquired monopsony power and we used your</p> <p>10 comparison between P*LOCAL and PLOCAL we would</p> <p>11 calculate a difference; wouldn't we?</p> <p>12 A. If the legal monopsony -- may or</p> <p>13 may not. If the legal monopsony -- if it's</p> <p>14 attempting to -- the monopsony being the</p> <p>15 processors.</p> <p>16 Q. Yes.</p> <p>17 A. To maximize their profits they</p> <p>18 would be acquiring at the least cost sources.</p> <p>19 Q. And would you expect if there were</p> <p>20 lawful monopsony power that PLOCAL would be less</p> <p>21 than P*LOCAL in using your first methodology?</p> <p>22 A. They may be the same.</p> <p>23 Q. Well, did I understand that the</p> <p>24 difference between P*LOCAL and PLOCAL was in this</p>	<p style="text-align: right;">Page 45</p> <p>1 report that you thought the processors were or</p> <p>2 were alleged to be monopsonists?</p> <p>3 A. And they're not unilateral.</p> <p>4 Q. I understand that. I'm just</p> <p>5 asking -- well, I'm not sure if I do understand</p> <p>6 that. That's the question I'm asking.</p> <p>7 Is it your understanding that</p> <p>8 there are no allegations in this case about the</p> <p>9 unilateral exercise of monopsony power by any of</p> <p>10 the processors in the Southeast?</p> <p>11 A. I can't answer that. Given your</p> <p>12 question, I don't understand.</p> <p>13 Q. Well, you said a few moments ago</p> <p>14 that you understood all the monopsony power in</p> <p>15 this case was exercised in collaboration with</p> <p>16 other people. It's a paraphrase, but is that in</p> <p>17 the ballpark of what you said a minute ago?</p> <p>18 MR. BROOKHISER: Object to the</p> <p>19 form of the question.</p> <p>20 THE WITNESS: The allegations in</p> <p>21 the Complaint involves coordinated behavior, and</p> <p>22 the monopsony that has occurred is one, in my</p> <p>23 judgment -- that in order to have the market</p> <p>24 power, as required, collective action, joint</p>

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<p>1 action, unilateral. There is -- if you're 2 talking about unilateral monopsony, I don't know 3 what that means, but there is no single firm, at 4 least for Orders 5 and 7, that exercises that 5 monopsony. 6 BY MR. KUNEY: 7 Q. You've never seen it? You said 8 you didn't understand the term unilateral 9 monopsony. Have you never in your many years of 10 being involved as an economist ever seen a 11 situation where there was a firm that had 12 unilateral monopsony power? 13 A. That's a very different question. 14 I have. 15 Q. So you do have some -- that term 16 has meaning to you? 17 A. Yes. 18 Q. And it's your understanding that 19 that's not this case. This case is all about, 20 as you understand it, collaborative conduct; is 21 that correct? 22 A. Well, to use a phrase that comes 23 out frequently by lawyers, the Complaint speaks 24 for itself. I haven't memorized each and every</p>	<p>1 way or another, about whether the allegations in 2 the Complaint include the allegation that the 3 Dean/Suiza merger created an entity with 4 monopsony power? 5 MR. BROOKHISER: Objection. Asked 6 and answered. 7 MR. KUNEY: Asked, but not 8 answered. 9 MR. BROOKHISER: I think it's been 10 asked and answered, maybe twice. 11 THE WITNESS: I'm not aware that 12 in my reading of the Complaint that there is an 13 allegation that the Dean/Suiza merger, by 14 itself, created a monopsony. It clearly is part 15 of the fabric. Or, to put it another way, if 16 you take that merger away there would be -- and 17 all of the subsequent actions related to it, 18 there could be a very different structural 19 marketplace in existence in Orders 5 and 7. 20 BY MR. KUNEY: 21 Q. You said a few minutes ago that in 22 the but-for world or the unfettered market SMA 23 would not exist or would not exist in its 24 current form. Did I hear that correctly?</p>
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<p>1 paragraph, but the thrust of the Plaintiffs' 2 allegations are that collectively the Defendants 3 have monopsony power in the procurement of and 4 marketing of Grade A raw milk. 5 Q. As you understand the Complaint -- 6 A. As I understand it, yes. 7 Q. Sorry, that was the introduction 8 to the next question. 9 As you understand the Complaint 10 are the Plaintiffs alleging that the Dean/Suiza 11 merger created an entity that had monopsony 12 power? 13 A. By itself, I don't know. 14 Q. Don't know? 15 A. It is part of the fabric that 16 proceeds to the conclusion in the Complaint, but 17 whether the Dean/Suiza merger by itself, 18 standing alone, created a -- without any of the 19 follow-on actions that came from that, created a 20 monopsony, I'm not aware of that. But it may 21 be. It's not part of my analysis. 22 Q. I understand. I'm trying to find 23 out if you -- what you understand the Complaint 24 to be saying. Do you have an understanding, one</p>	<p>1 A. Yes. What you didn't hear was 2 what I also said, but that's a determination I 3 haven't yet made or somebody in -- if it's not 4 me, somebody else who -- if it goes to another 5 phase of litigation will undertake. 6 Q. You said either SMA would not 7 exist or not exist in its current form, but you 8 haven't actually analyzed that question yet? 9 A. No, because that is part of the 10 damage implementation, which I -- which is to 11 examine with more precision what is the 12 institutional framework of the but-for 13 marketplace. 14 Q. So you don't -- this morning, 15 anyway, you don't have a position about what 16 that but-for marketplace would look like? 17 A. Well, I do in the sense that the 18 coordinated behavior as alleged would not be 19 existing, would not be in place. That's the 20 only assumption that I can make. 21 Q. And do you have an opinion as of 22 this morning about whether in the absence of 23 that coordinated behavior SMA would exist in 24 some form or other?</p>

<p style="text-align: right;">Page 50</p> <p>1 A. I have a preliminary opinion, but 2 since I have not yet estimated damages under 3 this or any other methodology, that preliminary 4 opinion, as far as I'm concerned, may not be 5 worth too much. 6 Q. What is that preliminary opinion? 7 A. That as -- my preliminary opinion 8 would be that SMA in its current form probably 9 would not be in existence. 10 Q. Why is that? 11 A. Because the key to SMA was its 12 ability to gain sufficient cooperative 13 membership that accounted for a very large 14 proportion of all cooperative dairy farmers and, 15 at least in one instance, the largest, Maryland 16 & Virginia, probably would not have been willing 17 in a but-for marketplace to have -- become a 18 member of SMA. Therefore, even if it had -- 19 even if it were being proposed by DFA and others 20 it is unlikely that in its current form it would 21 exist. 22 Q. And the one difference that you're 23 talking about at this point is whether Maryland 24 & Virginia would, in fact, have become a member?</p>	<p style="text-align: right;">Page 52</p> <p>1 A. Pooling by whomever? 2 Q. Pooling of cost and revenues 3 through SMA? 4 A. Well, part of it is -- for 5 example, if the allegations by the Plaintiffs 6 are true that milk from the -- Grade A raw milk 7 from the Southwest was acquired in volumes 8 that -- this is a term that is within the 9 industry, it's not my term, flooded the market 10 of the Southeast, and in which -- and for which 11 SMA, i.e., DFA farmers paid the transportation 12 of that milk, this is all part of the 13 allegations, so the answer is, yes. 14 Q. As you understand what the 15 Plaintiffs are alleging, are they alleging that 16 it is necessarily unlawful for the member co-ops 17 of SMA to collaborate in procuring milk from 18 outside Orders 5 and 7? 19 MR. BROOKHISER: Could you read 20 that question back, please? 21 (The record was read as 22 requested.) 23 THE WITNESS: My understanding is 24 no, they are not.</p>
<p style="text-align: right;">Page 51</p> <p>1 A. I use that as an example. 2 Q. I see. What else would be 3 different about SMA in the but-for world? 4 A. Now you're asking my preliminary 5 opinion to give you a final determination. It 6 may not exist. 7 Q. Will -- will whoever goes about 8 trying to estimate damages on a class-wide or 9 individual basis have to decide whether SMA 10 would exist in a but-for world? 11 A. The estimate of damages does not 12 require that. I believe that a reasonable 13 structure of the institutions that would exist 14 in a but-for environment need to be -- needs to 15 be established, just to understand how the 16 marketplace would operate. 17 Q. Based upon your work in the case 18 to date are there any efficiencies that you have 19 seen associated with the operations of SMA? 20 A. I've not addressed that question. 21 Q. Is it your understanding that the 22 pooling of cost and revenues is part of the 23 collaborative conduct that the Plaintiffs are 24 challenging in this case as unlawful?</p>	<p style="text-align: right;">Page 53</p> <p>1 BY MR. KUNEY: 2 Q. Is it your understanding that it 3 is unlawful because of this flooding that you 4 described a moment ago? 5 A. No. I think they've claimed that 6 there's an antitrust violation here because the 7 members -- the dairy farmers who are a part -- 8 who are the Class, in the end are receiving -- 9 having to bear the burden in two ways: 10 One is that collectively milk is 11 being procured from the Southwest in excess of 12 needs and, therefore, it has flooded the market 13 in the Southeast, and that this milk would only 14 become available, as I've indicated in my 15 report, economically available because the 16 transportation costs were paid in large part or 17 in full by the members of SMA. 18 Q. So is it your understanding that 19 it would not be economical for the member co-ops 20 of SMA to procure milk from the Southwest unless 21 they paid the transportation costs? 22 A. I haven't reached that 23 determination. That's what the first 24 methodology would be doing, first damage</p>

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<p>1 methodology. So it may turn out that there</p> <p>2 is -- when looking at the full acquisition</p> <p>3 costs, that some milk from the Southwest would</p> <p>4 still be part of the least cost solution.</p> <p>5 Q. Is it your understanding that</p> <p>6 throughout the Class period the member co-ops of</p> <p>7 SMA bore the cost of transporting milk from the</p> <p>8 Southwest to the Southeast?</p> <p>9 A. Throughout the full Class period,</p> <p>10 I don't know, because I haven't had access to</p> <p>11 all the documents, but I've seen the contracts</p> <p>12 for 2004, which refers to 2003. I haven't seen</p> <p>13 the contract for that particular year.</p> <p>14 2005, 2006.</p> <p>15 And Mr. Baird confirms that in, I</p> <p>16 think it was his Department of Justice</p> <p>17 deposition, that they wouldn't be shipping milk</p> <p>18 to the Southeast, Orders 5 and 7, without the</p> <p>19 huge transportation costs being covered.</p> <p>20 Q. Let's take a look if we could at a</p> <p>21 document that was previously marked, I think</p> <p>22 it's Plaintiffs' 185.</p> <p>23 THE REPORTER: You don't want it</p> <p>24 remarked?</p>	<p>1 the milk?</p> <p>2 MR. BROOKHISER: Where are you</p> <p>3 referring to, counsel?</p> <p>4 MR. KUNEY: Paragraph 3.</p> <p>5 THE WITNESS: Yes. I'm not</p> <p>6 interpreting this contract. I'm just agreeing</p> <p>7 with what you read.</p> <p>8 BY MR. KUNEY:</p> <p>9 Q. Well, I'm asking you a question.</p> <p>10 You've made comments about whether</p> <p>11 it would be economical for milk to move from</p> <p>12 Southwest to Southeast unless the Southeast</p> <p>13 bears the cost of transportation, and you said</p> <p>14 you looked at this contract. I'm just asking</p> <p>15 you whether it's not clear from the face of this</p> <p>16 contract that for calendar year 2004 the seller,</p> <p>17 namely Greater Southwest Agency, in fact, bore</p> <p>18 the cost of transportation?</p> <p>19 A. Whether it did or didn't will come</p> <p>20 out in a damage calculation.</p> <p>21 I'm not going -- I or somebody</p> <p>22 else would not begin with an assumption, I would</p> <p>23 not do that. I would look at the lowest</p> <p>24 areas -- surplus areas, as I described before,</p>
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<p>1 MR. LATCOVICH: No.</p> <p>2 MR. KUNEY: We don't need to</p> <p>3 remark it.</p> <p>4 BY MR. KUNEY:</p> <p>5 Q. Dr. Beyer, have you seen</p> <p>6 Plaintiffs' 185 before?</p> <p>7 A. I have.</p> <p>8 Q. And is this the contract between</p> <p>9 GSA and SMA for the calendar year 2004?</p> <p>10 A. Yes.</p> <p>11 Q. Take a look at paragraph 3, if you</p> <p>12 would, on that first page. See where it says,</p> <p>13 "milk will be priced at Birmingham, Alabama,</p> <p>14 local delivered price and seller will provide</p> <p>15 freight to Birmingham." Do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. Is that one of the provisions that</p> <p>18 you -- and contracts that you reviewed in</p> <p>19 concluding that the Southeast bore the cost of</p> <p>20 transporting milk from the Southwest?</p> <p>21 A. Yes.</p> <p>22 Q. Do you read, "seller will provide</p> <p>23 freight to Birmingham," to somehow mean that the</p> <p>24 Southeast is bearing the cost of transporting</p>	<p>1 of acquisition, and this could include West</p> <p>2 Texas and New Mexico, and the cost of hauling,</p> <p>3 the mileage, would be part of that. As I said</p> <p>4 in my prior answers, it may turn out that the</p> <p>5 but-for price of acquiring milk in the</p> <p>6 Southwest -- for Orders 5 and 7 may include some</p> <p>7 milk from the Southwest. That's -- there's</p> <p>8 nothing in that arrangement that suggests that</p> <p>9 it would not be part of the analysis.</p> <p>10 You were asking me different</p> <p>11 questions about assumptions, about conditions in</p> <p>12 the Complaint that would affect acquisition.</p> <p>13 Q. I'm actually asking you about your</p> <p>14 report, Dr. Beyer. Take a look at paragraph</p> <p>15 100.</p> <p>16 A. Now you are, okay.</p> <p>17 Q. Paragraph 100, page 50. The</p> <p>18 second sentence of paragraph 100 you wrote, "if</p> <p>19 the transportation costs were not subsidized by</p> <p>20 Southeastern producers it would not have been</p> <p>21 economical for Lone Star and GSA to transport</p> <p>22 milk from the Southwest to Orders 5 and 7."</p> <p>23 That's part of the text of your report; correct?</p> <p>24 A. That's correct.</p>

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<p>1 Q. And is it not apparent that, at 2 least for calendar year 2004, GSA bore the cost 3 of transporting milk from the Southwest to the 4 Southeast?</p> <p>5 MR. BROOKHISER: Objection. 6 You're asking him -- the best evidence is all of 7 the evidence. You've picked one sentence out of 8 one document and tried to characterize it.</p> <p>9 MR. KUNEY: That's fine. 10 THE WITNESS: Excuse me. 11 BY MR. KUNEY: 12 Q. By all means. Go ahead. 13 A. If it turns out that, in fact, the 14 detailed records comport with this particular 15 year's contract then that will be reflected in 16 the damage analysis. Under three, methodology 17 three or under methodology one. 18 There are years in which the 19 Southwest, GSA or Lone Star milk was subsidized 20 by SMA and Mr. Baird has -- who was the 21 principal involved in that, has agreed -- stated 22 that was the case. There are other contracts 23 where they clearly demonstrate that but, in any 24 event, what actually occurred is going to be</p>	<p>1 Q. Take a look, if you would, at I 2 suppose it's numbered 2 (2), in other words the 3 very bottom of the first page, Dallas to 4 Birmingham, and then the subparagraph 2 which 5 spills on over to the next page. Are you 6 looking at that?</p> <p>7 A. Yes. 8 Q. Do you see where it says, "milk 9 will be priced at Birmingham, Alabama local 10 delivered price and seller will provide freight 11 to Birmingham or equivalent distance from origin 12 to point of Dallas, Texas." Do you see that?</p> <p>13 A. Yes. 14 Q. So according to the contract, 15 apparently in 2003, the Southeast was not 16 subsidizing the transported milk pursuant to 17 this agreement?</p> <p>18 MR. BROOKHISER: I'll make the 19 same objection I did with the last document. 20 THE WITNESS: The same answers 21 that I gave to you, Exhibit 185, would apply to 22 Exhibit 677. 23 BY MR. KUNEY: 24 Q. So the -- your proposed use of the</p>
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<p>1 ultimately, when all the data -- transaction 2 data are available, will be determined. 3 Q. Let's take a look at another 4 document that was previously marked Plaintiffs' 5 677. 6 Is this one of the contracts 7 between the Southeast and Southwest that you 8 reviewed in preparing your report, Dr. Beyer?</p> <p>9 A. I don't think I've seen this one. 10 Q. If you look toward the middle of 11 the first page there you'll see, "this agreement 12 is entered into this first day of January 2003." 13 Do you see that?</p> <p>14 A. Yes, I do. Toward the bottom? 15 Q. Yes. And then a little farther 16 down it talks about, under Dallas to Birmingham, 17 seller to supply buyer, and then it refers to 18 the time period January 1, 2003 to December 31, 19 2003; is that correct?</p> <p>20 A. Yes. 21 Q. So this would appear to be the 22 2003 contract or a 2003 contract between SMA and 23 GSA; is that correct? 24 A. Yes, it would appear to be.</p>	<p>1 third methodology and your statement in 2 paragraph 100 that, "if transportation costs 3 were not subsidized by Southeastern producers it 4 would not have been economical for Lone Star and 5 GSA to transport milk from the Southwest to 6 Orders 5 and 7." Am I understanding you that 7 you stand by that as a valid methodology for use 8 in this case, notwithstanding the contractual 9 arrangements whereby GSA was bearing the cost of 10 moving the milk in at least 2003 and 2004?</p> <p>11 MR. BROOKHISER: Objection. 12 Misstates the evidence. Assumes facts not in 13 evidence. 14 THE WITNESS: The detailed records 15 and information that they provide would be the 16 basis for determining whether and to what extent 17 imports from the Southwest, over whatever period 18 it applies, would or would not in particular 19 time frames be economical alternatives for 20 Southeast in Orders 5 and 7. 21 BY MR. KUNEY: 22 Q. And your third methodology, the 23 validity of using your third methodology, does 24 it turn on the outcome of that evaluation,</p>

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<p>1 ultimately who paid for the cost of transporting 2 milk from the Southwest to the Southeast? 3 A. No. It determines on -- it hinges 4 on the determination of the pounds of milk that 5 would have been imported in a but-for situation 6 from the Southwest and determining what 7 difference between that number and the actual 8 imports from the Southwest, over whatever time 9 period, what the effects would be. 10 Q. I take it you're not saying that 11 you decided that in the but-for world the number 12 of pounds of milk that would have been imported 13 from the Southwest is zero? You're not saying 14 that? 15 A. Oh, no. No. It may turn out that 16 way, but I haven't done that analysis and I 17 wouldn't go just on the contractual. I'm just 18 saying from what I've seen, maybe the later 19 years, Mr. Baird's testimony, which was done in 20 2005, so it covered some prior period where he's 21 in effect saying, the Southeast is not an 22 economical market for us without the assistance 23 of SMA. 24 Q. Have you in your work in the case</p>	<p>1 THE VIDEOGRAPHER: Here begins 2 videotape number two taken in the deposition of 3 Dr. John Beyer. Going back on the record. The 4 time on the monitor is 10:48:49. 5 During the break we have been 6 joined by counsel on the phone. Counsel, please 7 introduce yourselves, one at a time. 8 MR. BOULWARE: This is Brandon 9 Boulware, counsel for Gerald Bos. 10 MR. EVERSON: David Everson for 11 Gary Hanman. 12 THE VIDEOGRAPHER: Thank you. 13 BY MR. KUNEY: 14 Q. Dr. Beyer, take a look if you 15 would at paragraph 104, it's at the bottom of 51 16 and over onto page 52 of your report. This is 17 part of your third proposed damages methodology; 18 correct? 19 A. Yes. 20 Q. And you wrote, "by estimating the 21 impact Southwest imports had on the price of 22 milk in the Southeast a but-for price of milk in 23 the Southeast can be calculated, absent the 24 imports. This estimated but-for price can then</p>
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<p>1 to date evaluated a lawsuit that Mr. Baird and 2 Lone Star filed against DFA concerning the 3 Southeast? 4 A. I'm aware of it, but I have not 5 evaluated it, and as an economist I don't make a 6 habit of evaluating lawsuits. I don't know how 7 to go about that process. 8 Q. Do you have an understanding -- 9 any understanding about what Mr. Baird and Lone 10 Star were alleging with respect to their ability 11 to market milk in the Southeast? 12 A. At some point I probably read 13 about it, I just don't recall. 14 MR. BROOKHISER: Steve, would this 15 be an okay time, we've been going for about an 16 hour and a half, to take a short break? 17 MR. KUNEY: Fine, but she has to 18 tell us we're going off the record. 19 THE VIDEOGRAPHER: Thank you. 20 Here marks the end of videotape 21 number one, taken in the deposition of Dr. John 22 Beyer. Going off the record. The time on the 23 video screen is 10:36:29. 24 (A brief recess was taken.)</p>	<p>1 be compared to the actual price to members of 2 the proposed Class. The difference between the 3 two is an estimate of the undercharge." Is that 4 correct? 5 A. Yes. 6 Q. So the but-for price that you 7 would calculate using your third methodology 8 would be what the price of milk would have been, 9 absent any imports; correct? 10 A. No. 11 Q. Absent what portion of the 12 imports? 13 A. Absent -- we went through this 14 with the question prior -- the last question 15 prior to the break. 16 What the actual imports have been 17 from the Southwest and what they would have been 18 is yet to be determined, so the -- and there 19 may, in fact, be several numerical values that 20 are used in the regression analysis -- several 21 values for the imports from the Southwest, 22 depending on the degree of confidence that I or 23 someone else is doing this analysis concludes 24 would still occur from the Southwest in a</p>

<p style="text-align: right;">Page 66</p> <p>1 but-for marketplace.</p> <p>2 Q. So there's another step beyond</p> <p>3 what you've mentioned, which is that you have to</p> <p>4 consider what to do with that coefficient</p> <p>5 estimate of the variable imports in terms of</p> <p>6 what imports would have been in your but-for</p> <p>7 world?</p> <p>8 A. No. The coefficient, which is a</p> <p>9 value from the regression analysis for imports</p> <p>10 from the Southwest, will undoubtedly change as</p> <p>11 the value for imports, the pounds from the</p> <p>12 Southwest are used in the analysis. So just</p> <p>13 hypothetically, if three different values are</p> <p>14 used, 90 percent, 50 percent, 40 percent, the</p> <p>15 coefficient for imports will change.</p> <p>16 Determining what would be the</p> <p>17 appropriate value will in large measure come out</p> <p>18 of or flow out of the first methodology.</p> <p>19 Q. So are you proposing that you use</p> <p>20 methodology one and methodology three, together,</p> <p>21 to arrive at a damages estimate on a class-wide</p> <p>22 basis?</p> <p>23 A. No. No. The damages in</p> <p>24 methodology one represents costs of acquisition.</p>	<p style="text-align: right;">Page 68</p> <p>1 A. It may turn out that it is all of</p> <p>2 the imports, but it may be less than all of the</p> <p>3 imports.</p> <p>4 Q. And by some method, apparently not</p> <p>5 described in here, you're going to -- you're</p> <p>6 positing that someone could determine what</p> <p>7 portion of the imports should be considered</p> <p>8 excess?</p> <p>9 A. Methodology one provides in the</p> <p>10 end a source of imports by origination,</p> <p>11 identifying the low cost alternative for</p> <p>12 Southeast processors.</p> <p>13 The same thing would be the case</p> <p>14 in the results from that answer would guide the</p> <p>15 analysis that was being proposed in methodology</p> <p>16 two.</p> <p>17 The outcomes are very different.</p> <p>18 Methodology one is looking at the cost of</p> <p>19 acquisition for raw milk.</p> <p>20 Methodology three is looking at</p> <p>21 the question ultimately what is the effect of</p> <p>22 excess imports from the Southwest on the price</p> <p>23 of milk in the Southeast.</p> <p>24 Q. How do you propose to use your</p>
<p style="text-align: right;">Page 67</p> <p>1 In methodology two, assuming that</p> <p>2 some of the imports for purposes of discussion</p> <p>3 right now, assuming that some of the imports</p> <p>4 from the Southwest would not have occurred in</p> <p>5 the but-for marketplace, the ultimate objective</p> <p>6 is to determine what the effect of the excess</p> <p>7 imports that actually took place, which may be</p> <p>8 90 percent in our hypothetical, 50 percent or</p> <p>9 40 percent, has on the price of milk in the</p> <p>10 Southwest.</p> <p>11 Q. Where in your discussion of</p> <p>12 methodology three do you explain how we're going</p> <p>13 to determine what part of the imports were</p> <p>14 excess?</p> <p>15 A. That sentence does not appear in</p> <p>16 the discussion under methodology three, but in</p> <p>17 determining the values for the different</p> <p>18 parameters used in the analysis that would be</p> <p>19 part of the analysis, rather than simply taking</p> <p>20 it as 100 percent of imports.</p> <p>21 Q. I see. So when you wrote at the</p> <p>22 very top of 52, "a but-for price can be</p> <p>23 calculated absent the imports," you didn't mean</p> <p>24 to imply all of the imports?</p>	<p style="text-align: right;">Page 69</p> <p>1 first methodology to determine what portion of</p> <p>2 the imports were excess?</p> <p>3 A. It would be whatever the least</p> <p>4 cost alternative, whatever proportion, if any,</p> <p>5 of milk from the Southwest is part of the least</p> <p>6 cost acquisition, subtract that sum for each</p> <p>7 year from the actual imports, and that would</p> <p>8 be -- that difference would be the value that is</p> <p>9 used -- if I were doing it, in the equations</p> <p>10 that are shown on page 51.</p> <p>11 Q. Are all of the sources of least</p> <p>12 cost milk for purposes of your first methodology</p> <p>13 in the Southwest?</p> <p>14 A. I'm sorry, I didn't understand.</p> <p>15 Q. In your first methodology where</p> <p>16 you talk about the price of acquiring milk from</p> <p>17 outside Orders 5 and 7, you were not restricting</p> <p>18 yourself to milk that came from the Southwest;</p> <p>19 were you?</p> <p>20 A. By no means, no.</p> <p>21 Q. It could be the least cost source</p> <p>22 of milk might be Ohio, Michigan, Indiana,</p> <p>23 Pennsylvania. There's a variety of different</p> <p>24 places?</p>

<p style="text-align: right;">Page 70</p> <p>1 A. Which would all be brought 2 together to provide in a but-for marketplace 3 cost of acquisition of all imports into Orders 5 4 and 7, and it may turn out that part of that 5 total aggregation of imports, which would still 6 be required in 5 and 7, would include some 7 imports from the Southwest. 8 Q. Is there some reason why in your 9 third methodology you're focusing just on 10 imports from the Southwest? 11 A. Yes. 12 Q. Why is that? 13 A. We have gone over it prior to the 14 break. 15 Because allegations in the 16 Complaint are that there were two things: 17 Excessive imports. Excessive in some sense, 18 imports from the Southwest. 19 And, secondly, that for some 20 period of time SMA paid for transportation costs 21 to bring those pounds of milk into the 22 Southeast. 23 Q. So as you understand the 24 Plaintiffs' Complaint there's no complaint about</p>	<p style="text-align: right;">Page 72</p> <p>1 A. The answer to that would be in the 2 implementation of methodology one. 3 Q. Where in the implementations will 4 I find the Rosetta Stone to figure out what part 5 of those imports are excess? 6 MR. BROOKHISER: Objection. 7 THE WITNESS: You find the Rosetta 8 Stone by going to the airport and buying it from 9 them. The stock is doing well, by the way. 10 As I visualize what I would do, 11 and I may not be the person or Nathan Associates 12 the entity to do this estimate, but the 13 acquisition cost, which includes necessarily the 14 source and the transportation costs would be 15 part of the answer. And so that for the various 16 procurement areas, and Portales would probably 17 be one of the locations, it may turn out that -- 18 it's not just identifying as a source, it's 19 identifying in the totality what proportion of 20 the milk acquired would come from Portales. 21 In effect, the answer is, 22 hypothetically, if 3 billion pounds of milk were 23 imported into the Southeast in a given year -- 24 that's not all going to come from one source.</p>
<p style="text-align: right;">Page 71</p> <p>1 flooding by bringing milk in from Ohio or 2 Indiana, or Pennsylvania; is that correct? 3 A. That's correct, if, in fact, the 4 quantity of milk that is acquired meets the 5 demands, local production, plus imports, without 6 an equilibrium situation. My understanding is 7 that what the Complaint is complaining about is 8 that some of the exports, maybe all of the 9 exports, I just don't recall, from the Southwest 10 were governed more by institutional arrangements 11 than by economics and, therefore, at least some 12 of those imports were not required in the 13 Southeast. 14 Q. So I'm going through methodology 15 one, your first methodology, and I identify 16 Portales, New Mexico as a possible source of low 17 cost milk from outside Orders 5 and 7, and I 18 somehow find the data for what that milk might 19 have cost in '02, and '03, and '04, and '05, and 20 I run your linear programming model, and I 21 implement methodology one. How do I then use 22 that information in some fashion to decide what 23 part of the exports that came in from Portales, 24 New Mexico were excess and not market driven?</p>	<p style="text-align: right;">Page 73</p> <p>1 Beginning with the lowest cost and 2 a certain number of pounds -- I mean, you can't 3 create milk where there is not milk available, 4 obviously, those are real facts. The cost of 5 acquisition of the milk, you use the word, we 6 might find that data. We know that data. I 7 don't know it all now, but somebody would. 8 And through the nine or ten or 9 however many acquisition sources, there would be 10 a cascade with certain pounds involved so that 11 all the requirements of the Southeast for 12 imports are met. 13 In that, it may turn out that some 14 imports from the Southwest take place. That 15 would be -- the set of information that would go 16 into, in my judgment, in the looking at the 17 price effect on Southeast milk from "excessive" 18 imports from the Southwest. 19 BY MR. KUNEY: 20 Q. So am I understanding that as we 21 do this linear programming exercise, as long as 22 milk from the Southwest appears as a low cost 23 alternative, compared to other sources those 24 would not be "excess" imports when we move to</p>

<p style="text-align: right;">Page 74</p> <p>1 methodology three?</p> <p>2 A. I think I understand your</p> <p>3 question, but let me state it again.</p> <p>4 If one were to apply the approach</p> <p>5 for methodology, the one that I am suggesting,</p> <p>6 there would be an identification of the quantity</p> <p>7 of milk imported, so out of the 3 billion a</p> <p>8 certain amount from Indiana and so forth. And</p> <p>9 it may be that there is a small set of pounds</p> <p>10 that come out of that analysis coming from the</p> <p>11 Southwest. So that's part of the total least</p> <p>12 cost acquisition.</p> <p>13 That amount would be subtracted</p> <p>14 from the actual pounds coming from the</p> <p>15 Southwest, and the difference would be used in</p> <p>16 the methodology on two.</p> <p>17 Q. Have you investigated the relative</p> <p>18 cost of milk purchased from the Southwest,</p> <p>19 compared to milk purchased from other places</p> <p>20 outside of Orders 5 and 7?</p> <p>21 A. I have not myself, but I've seen</p> <p>22 some of the work that Mr. Sims has done, which I</p> <p>23 think was in 2005, 2006.</p> <p>24 Q. And does that work suggest that</p>	<p style="text-align: right;">Page 76</p> <p>1 We don't have total imports into the Southeast.</p> <p>2 Q. And why is that?</p> <p>3 A. Because some of the Defendants</p> <p>4 have not provided this. Also, the processors</p> <p>5 have not identified -- we don't have a totality</p> <p>6 of them. And the final source of that</p> <p>7 information is with the market -- milk market</p> <p>8 administrator in Order 5 and 7.</p> <p>9 Q. Looking at your paragraph 102, and</p> <p>10 the supply and demand equations, why does the</p> <p>11 supply of raw milk depend only on imports from</p> <p>12 the Southwest and not include imports from other</p> <p>13 areas?</p> <p>14 A. The -- I haven't thought of this,</p> <p>15 but I think you could, except for right now I</p> <p>16 think you -- let me give you the short answer.</p> <p>17 The variable of interest and its</p> <p>18 influence on supply is the coefficient that goes</p> <p>19 with that particular import, the import from the</p> <p>20 Southwest.</p> <p>21 Whether you could include other --</p> <p>22 all the imports, possibly. I would have to</p> <p>23 think about that.</p> <p>24 The only variable of interest is</p>
<p style="text-align: right;">Page 75</p> <p>1 milk from the Southwest is more expensive than</p> <p>2 milk from other areas outside of Orders 5 and 7?</p> <p>3 A. The answer is, yes and no.</p> <p>4 It's not an either or. It is what</p> <p>5 are -- you have to think of it in these terms.</p> <p>6 What are the incremental imports,</p> <p>7 the last imports. The last imports, meaning</p> <p>8 they are going to be the higher cost. And it</p> <p>9 may turn out that the Southwest, even if it is</p> <p>10 higher cost than alternative locations, is an</p> <p>11 economical source for imports, for some imports.</p> <p>12 Q. And the excess imports that we're</p> <p>13 trying to identify are only the ones that are</p> <p>14 not an economical -- would not be economically</p> <p>15 purchased from the Southwest?</p> <p>16 A. Yes.</p> <p>17 Q. Have you investigated the</p> <p>18 availability of the data you would need to</p> <p>19 implement your third methodology?</p> <p>20 A. I believe that -- I'm looking at</p> <p>21 the independent variables. I believe that all</p> <p>22 the data are available or would be available</p> <p>23 from -- for imports from methodology one.</p> <p>24 I have to say one thing, though.</p>	<p style="text-align: right;">Page 77</p> <p>1 to identify quantitatively the relationship</p> <p>2 initially between imports -- excessive imports,</p> <p>3 either 100 percent or some portion less on the</p> <p>4 supply of milk, an actual quantity that we have</p> <p>5 that's produced in the Southeast and,</p> <p>6 ultimately, as stated on the bottom of page 51,</p> <p>7 52, the relationship of the price of milk or the</p> <p>8 imports from the Southwest on the price of milk</p> <p>9 in the Southeast.</p> <p>10 Q. In developing your system of</p> <p>11 equations in this third methodology is there</p> <p>12 some reason why you would want to purposefully</p> <p>13 leave out the part of the supply of milk to the</p> <p>14 Southeast that comes from areas other than the</p> <p>15 Southwest?</p> <p>16 A. If one were interested in</p> <p>17 identifying what effect total imports have on,</p> <p>18 I'll call it domestic production within Orders 5</p> <p>19 and 7, you could include that, but that's not a</p> <p>20 variable interest, because what we're looking at</p> <p>21 is something that the Complaint alleges is a</p> <p>22 result of the collective behavior of the</p> <p>23 Defendants, that is imports, excessive imports</p> <p>24 from the Southwest.</p>

<p style="text-align: right;">Page 78</p> <p>1 Q. If you're going to correctly 2 specify a system of equations that lets you 3 estimate the variable of interest, don't you 4 want to include other variables that you know 5 are part of the supply or demand for raw milk? 6 A. The way you've worded the 7 question, yes. But keep in mind the supply of 8 raw milk here, as well as the quantity demanded, 9 is of domestically produced milk in what is in 10 Orders 5 and 7. Not the total milk, but the 11 quantity of milk that is produced in 5 and 7. 12 What the equations express is in 13 wanting to understand whether the quantity is 14 affected by excessive imports, not those that 15 have normally occurred as a result of decisions 16 that have been made. And so what I'm ultimately 17 concerned about is what effect do these 18 "excessive" imports of raw milk have on the 19 price of raw milk in the Southeast. 20 Q. Are you suggesting, Dr. Beyer, by 21 your equation in paragraph 102, that in trying 22 to estimate the impact on price in the Southeast 23 of imports from the Southwest do you think it 24 would be methodologically prudent to exclude</p>	<p style="text-align: right;">Page 80</p> <p>1 leave out other sources of supply to the 2 Southeast. I guess we have established that, 3 haven't we? 4 A. Yes. 5 Q. Do you know what the correlation 6 is between imports from the Southwest into the 7 Southeast and imports from other areas into the 8 Southeast? 9 A. Well, I don't -- the answer is, 10 no. I don't have import data except through 11 various anecdotal sources. 12 Q. So I take it you don't know what 13 the magnitude is of imports from the Southwest 14 into the Southeast versus imports from other 15 areas? 16 A. It is probably a relatively modest 17 proportion, the imports from the Southwest of 18 total imports into the Southeast. Whether it is 19 small or large in proportion is not material at 20 this point. I'm just trying to identify the 21 effect on the quantity of domestically produced 22 milk and the effect in the end on the price that 23 the farmers receive. 24 Q. Did I hear correctly that the</p>
<p style="text-align: right;">Page 79</p> <p>1 from your supply equation, milk that came into 2 the Southeast from other areas? 3 A. What was the term you used, the 4 methodologically imprudent or prudent? 5 Q. Prudent? 6 A. To exclude that? 7 Q. Prudent to leave it out? You've 8 got supply of milk equals, you've left out milk 9 from anywhere else? 10 A. If this were -- the quantity of 11 milk, which is the supply, is domestically 12 produced milk. 13 What I'm trying to -- 14 Q. Are you saying that the factors in 15 parentheses there after 102, in the middle of 16 paragraph 102, all relate to domestically 17 produced milk? 18 A. Yes. 19 Q. Including imports from the 20 Southwest that is domestically produced milk? 21 A. I want to understand the 22 relationship of that independent variable on 23 domestic production. 24 Q. And your proposal to do that is to</p>	<p style="text-align: right;">Page 81</p> <p>1 quantity coming from the Southwest is probably a 2 relatively modest proportion of the total 3 quantity of imported milk? 4 A. Yes. 5 Q. Why do you think that? 6 A. Some of the preliminary numbers 7 that I've seen, though they're subject to a lot 8 of estimation, reveal that. 9 Q. That there's a lot more milk 10 coming from other places? 11 A. When you use that -- those words, 12 the proportion of milk coming from other 13 sources, geographic, if you add all that 14 together, are greater than the quantity of milk 15 coming from the Southwest. 16 Q. What proportion of the milk, raw 17 milk delivered to processing plants in the 18 Southeast comes from the Southeast? 19 A. Well, we don't have -- again, the 20 ultimate source of this is the milk market 21 administrator in the two Orders. I have not yet 22 had access to that data. It's deemed to be 23 confidential and the Defendants have not 24 provided -- we have not been able to ascertain</p>

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<p>1 from the various sources of data that have been 2 provided by the Defendants, the imports or the 3 source of milk. 4 Q. The market administrator 5 information is deemed confidential by whom? 6 A. By the market administrator. 7 Q. I see. So you have tried to get 8 access, but have been unable to? 9 A. Yes, for the totality. Piecing 10 together the information that I have had access 11 to I am able to conclude, as I've just 12 described, that -- this is really trying to 13 recall from memory some numbers that I saw some 14 time ago, that imports from the Southwest, and 15 they varied over time, are a modest proportion 16 of the total imports of Grade A raw milk into 17 Orders 5 and 7. 18 Q. And even -- do you have in mind 19 even a kind of a ballpark or order of magnitude 20 on the total volume of imports from all the 21 areas of the Southeast versus the volume of 22 local production of milk in the Southeast? 23 A. Again, the data that we've had to 24 rely on is subject to so much error, but it</p>	<p>1 A. Over the long-term I think it has, 2 as an economist, because price has been taken 3 out of the equation, and to the extent that 4 Defendants have taken -- have removed price from 5 the equation from the calculus that a farmer 6 uses supply can only go in one direction, and 7 that's down. 8 Q. Is it -- is it your view that the 9 deficit in the Southeast, the gap between local 10 demand and local production, is the result of 11 the conduct alleged in the Complaint? 12 A. No. 13 Q. So -- 14 A. There may -- very straightforward. 15 If you look at the deficit, the 16 difference between using an indicator of demand, 17 such as population or some other method, which 18 has continuously increased for the Southeast, 5 19 and 7, and some measure, which was very rough, 20 but if applied consistently is -- I think, it's 21 in 14 or 15 on exhibit of my report, shows that 22 Grade A raw milk produced in Orders 5 and 7 has 23 consistently declined, and yet price, except in 24 the very latter part of the Class period,</p>
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<p>1 would be in the low 20 percent. 2 Q. 20 percent is the total? 3 A. Of the total supply. 4 Q. Is imported? 5 A. Is imported. 6 Q. I see. And just ballparking 7 again, about what part of that 20 percent do you 8 estimate comes from the Southwest? 9 A. I don't remember. 10 Q. Do you have in mind a location 11 from -- other than the Southwest, that's the 12 source of that 20 percent or locations? 13 A. This again is from reading 14 depositions and from work papers that Mr. Sims, 15 that have become part of the deposition record, 16 there are parts of Pennsylvania, Ohio, 17 Indiana -- parts of Indiana that are not within 18 Order 5. Parts of Michigan, I believe, but 19 again, I would have to go back and look at the 20 underlying sources of information. 21 Q. Is it -- is it your opinion that 22 the Defendants' conduct as alleged in the 23 Complaint has reduced the local production of 24 milk in the Southeast?</p>	<p>1 doesn't seem to have been recognized or adopted 2 as part -- as part of the calculation of how to 3 bring equilibrium to that change. 4 The deficit -- there would 5 continue to be a deficit. The question is, 6 would it be as large as it is if a different set 7 of prices were in operation, and over what time 8 period, but that's a different set of 9 considerations. 10 Q. And you're not saying, if I 11 understood you a moment ago, that in the world 12 unfettered by Defendants' conduct that the 13 deficit of the Southeast would be zero? You're 14 not saying that? 15 A. No. The Defendants have a lot of 16 control, but they don't have control over people 17 and what they eat and what they drink. They can 18 influence the pattern through price, but not 19 otherwise. 20 Q. Have you -- have you already 21 reached the opinion that Defendants' conduct has 22 led to a reduction in the local supply of milk? 23 A. That opinion is -- such an opinion 24 is not necessary for the conclusions that I've</p>

<p style="text-align: right;">Page 86</p> <p>1 reached, either on impact or on damage</p> <p>2 feasibility of class-wide damage.</p> <p>3 Q. I understand it's not necessary.</p> <p>4 I just asked if you've reached that opinion?</p> <p>5 A. I've given you the sum total of</p> <p>6 observations that I've made, and it comes out of</p> <p>7 my background as an economist.</p> <p>8 Q. Let's take a look at paragraph 56,</p> <p>9 if we could. It's on page 30. Do you have that</p> <p>10 in front of you?</p> <p>11 A. I do.</p> <p>12 Q. Okay. You wrote at the beginning</p> <p>13 of paragraph 56, with respect to the first</p> <p>14 dimension, and that's I think a reference back</p> <p>15 to the previous paragraph, "assuming Plaintiffs'</p> <p>16 allegations are true, I conclude that any</p> <p>17 analysis performed to assess Defendants' market</p> <p>18 power and alleged wrongdoing would be common to</p> <p>19 all members of the proposed Class and</p> <p>20 sub-Classes." Do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. What is the alleged</p> <p>23 wrongdoing that you have analyzed such that you</p> <p>24 can conclude that you could evaluate that</p>	<p style="text-align: right;">Page 88</p> <p>1 anticompetitive conduct?</p> <p>2 A. That's a different question.</p> <p>3 MR. BROOKHISER: Could I hear that</p> <p>4 question again then?</p> <p>5 MR. KUNEY: Same reaction.</p> <p>6 THE WITNESS: It is. You were</p> <p>7 saying?</p> <p>8 MR. BROOKHISER: He's more</p> <p>9 attentive than I am.</p> <p>10 THE WITNESS: Your first question</p> <p>11 was -- big difference.</p> <p>12 Your first question was please</p> <p>13 tell me what the alleged wrongdoings are and</p> <p>14 how.</p> <p>15 BY MR. KUNEY:</p> <p>16 Q. Oh, I understand. I asked a</p> <p>17 different question than that one. I'm now</p> <p>18 trying to understand what you wrote?</p> <p>19 A. And now you're asking me if I were</p> <p>20 assessing whether for one or for the Class as a</p> <p>21 whole, using common proof how would I come to</p> <p>22 the conclusion that an allegation of behavior is</p> <p>23 deemed to be anticompetitive.</p> <p>24 Q. I was getting there, but I think</p>
<p style="text-align: right;">Page 87</p> <p>1 alleged wrongdoing using common evidence for all</p> <p>2 members of the Class?</p> <p>3 A. Without going through -- let me do</p> <p>4 it by way of illustration.</p> <p>5 Q. Sure.</p> <p>6 A. Because if there is -- if it</p> <p>7 applies to one allegation it would apply to all</p> <p>8 of them.</p> <p>9 Let's assume for purposes of this,</p> <p>10 of my answer, that one of the allegations is</p> <p>11 that the Defendants have excluded dairy farmers</p> <p>12 from their choice of being independents or being</p> <p>13 part of DFA or some other cooperative member.</p> <p>14 If that allegation is to assess</p> <p>15 that allegation and whether or not it is</p> <p>16 anticompetitive you would need the same set of</p> <p>17 information for one Class member or -- and for</p> <p>18 all. Therefore, the information to assess the</p> <p>19 anticompetitive nature of that allegation is</p> <p>20 common. It's a common proof, and that's all</p> <p>21 that I mean by that.</p> <p>22 Q. Do you mean by the sentence I read</p> <p>23 that using common proof you could decide whether</p> <p>24 the alleged wrongdoing was, in fact,</p>	<p style="text-align: right;">Page 89</p> <p>1 at this point I was only asking whether by that</p> <p>2 sentence you meant that you would be able to</p> <p>3 determine whether the alleged wrongdoing was, in</p> <p>4 fact, wrongdoing, based on common proof. Is</p> <p>5 that what you're telling us?</p> <p>6 A. I'm not going to be asked to do</p> <p>7 that.</p> <p>8 Q. I don't think I asked that</p> <p>9 question.</p> <p>10 A. But whoever does will be using</p> <p>11 common proof, whether done for the same set of</p> <p>12 information -- whether done for Mr. Robey or</p> <p>13 done for the Class of 4,000 and some members.</p> <p>14 Q. I understand that you haven't done</p> <p>15 the evaluation yet of whether the alleged</p> <p>16 wrongdoing was wrongdoing?</p> <p>17 A. And I may never.</p> <p>18 Q. My question is, are you offering</p> <p>19 the opinion that when it comes time for someone</p> <p>20 to do that evaluation they'll be able to do it</p> <p>21 using common proof?</p> <p>22 A. By common proof I mean nothing</p> <p>23 more than whether one does it for an individual</p> <p>24 dairy farmer or for all dairy farmers who</p>

<p style="text-align: right;">Page 90</p> <p>1 constitute the Class, it's the same.</p> <p>2 Q. So we could save a lot of time</p> <p>3 probably and just do it as to one person and</p> <p>4 that evaluation of whether the alleged</p> <p>5 wrongdoing was a wrongdoing in your view, could</p> <p>6 stand for all?</p> <p>7 A. Yes.</p> <p>8 Q. And you are offering that opinion</p> <p>9 today?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. Good.</p> <p>12 I've got copies of the Complaint.</p> <p>13 I don't really want to mark it, but if you would</p> <p>14 like to have it in front of you I'm happy to do</p> <p>15 that?</p> <p>16 MR. BROOKHISER: Probably.</p> <p>17 MR. KUNEY: Sure. Not going to do</p> <p>18 all of them, just want to do a couple.</p> <p>19 BY MR. KUNEY:</p> <p>20 Q. Dr. Beyer, I'm looking at page 5?</p> <p>21 A. Of?</p> <p>22 Q. Of the Corrected, Amended,</p> <p>23 Consolidated Complaint, which we are not marking</p> <p>24 as an exhibit, okay. Do you have that?</p>	<p style="text-align: right;">Page 92</p> <p>1 for the single dairy farmer you would have to</p> <p>2 look at what happened in the Southeast as a</p> <p>3 whole, because the dairy farmer -- the effect on</p> <p>4 the dairy farmer ultimately is what is paid, and</p> <p>5 whether this dairy farmer and when was denied</p> <p>6 access, except through a DFA entity, control</p> <p>7 entity, may not in the end have an impact on his</p> <p>8 price. That is going to be effectively</p> <p>9 determined area wide. Therefore, the analysis</p> <p>10 that would need to be done for that single dairy</p> <p>11 farmer has to look at the whole area, all of the</p> <p>12 Southeast.</p> <p>13 So, in effect, even though his</p> <p>14 particular circumstances may vary, in the end he</p> <p>15 is paid based on prices that are calculated,</p> <p>16 determined for the Southeast as a whole.</p> <p>17 Q. I don't believe I asked a question</p> <p>18 about what he was paid. I asked a question</p> <p>19 about the allegation that Southeast dairy</p> <p>20 farmers were required to market their milk</p> <p>21 through DFA controlled entities such as DMS or</p> <p>22 SMA, the allegation that's in paragraph 3(c) of</p> <p>23 the Complaint.</p> <p>24 Is it your opinion that you can</p>
<p style="text-align: right;">Page 91</p> <p>1 A. Yes, I do.</p> <p>2 Q. Okay. Look at subparagraph C,</p> <p>3 which I think is in the ballpark of the</p> <p>4 allegation that you referenced a few minutes</p> <p>5 ago, requiring Southeast dairy farmers to market</p> <p>6 their fluid Grade A milk through DFA controlled</p> <p>7 entities such as DMS or SMA to gain access to</p> <p>8 fluid Grade A milk bottling plants.</p> <p>9 You're familiar with that being</p> <p>10 one of the allegations in the Complaint?</p> <p>11 A. I am.</p> <p>12 Q. We'll try to find some way to</p> <p>13 shorthand that. Requiring Southeast dairy</p> <p>14 farmers to market through a DFA controlled</p> <p>15 entity. If I use that shorthand can this stand</p> <p>16 in for this full subparagraph C?</p> <p>17 A. It's still a mouth full.</p> <p>18 Q. It still is.</p> <p>19 So is it your opinion that you</p> <p>20 could evaluate that allegation by using the</p> <p>21 example of a single dairy farmer and that</p> <p>22 evaluation and that proof could stand for every</p> <p>23 member of the proposed Class?</p> <p>24 A. In the end you would have to --</p>	<p style="text-align: right;">Page 93</p> <p>1 evaluate that allegation that farmers were</p> <p>2 required to market their milk, et cetera, by</p> <p>3 looking at the proof for a single dairy farmer</p> <p>4 and that that will stand for all members of the</p> <p>5 proposed Class?</p> <p>6 MR. BROOKHISER: Asked and</p> <p>7 answered.</p> <p>8 THE WITNESS: Without repeating my</p> <p>9 answer, I'm not sure I can answer it any</p> <p>10 differently.</p> <p>11 Though the circumstances for an</p> <p>12 individual dairy farmer in terms of</p> <p>13 accessibility may be different in certain time</p> <p>14 periods than this allegation, or the extent to</p> <p>15 which it's different. The effect -- that's what</p> <p>16 really counts. The effect of this allegation is</p> <p>17 what happens in the Southeast as a whole, and</p> <p>18 the effect is ultimately on the price that that</p> <p>19 individual dairy farmer receives for the Grade A</p> <p>20 milk that he or she produces.</p> <p>21 BY MR. KUNEY:</p> <p>22 Q. Were all of the -- have you</p> <p>23 evaluated the extent to which the named</p> <p>24 Plaintiffs were required to market their fluid</p>

<p style="text-align: right;">Page 94</p> <p>1 Grade A milk through DFA controlled entities 2 such as DMS or SMA? 3 A. My recall from reading the 4 depositions is that the members -- the named 5 Plaintiffs were either DFA members or 6 independents that were -- which made them now 7 DMS, or in one case I recall, I think this was 8 Mr. Robey, became -- went from DMS to Dean 9 Direct. 10 In the end the prices that they 11 receive at various points in the Class period, 12 and that's ultimately what this is all about, is 13 an area-wide or market-wide analysis. So 14 whether it's Mr. Robey or Mr. Virgil or 15 Mr. Bendler or so on and so forth, the extent of 16 this allegation, the effect of this allegation 17 is ultimately going to be reflected in the 18 prices that they receive for the milk they 19 produce and sell. 20 Q. So am I understanding you 21 correctly that in determining whether Mr. Robey, 22 for example, was required to market his milk 23 through a DFA controlled entity, it's of no 24 moment to you that, in fact, now he's a Dean</p>	<p style="text-align: right;">Page 96</p> <p>1 his milk? 2 A. Yes, you can. 3 Q. Can you evaluate whether a dairy 4 farmer was required to market through a DFA 5 controlled entity without inquiring into whether 6 he is located near a plant that procures 7 independent milk? 8 A. Yes, you can, and I've stated it 9 very clearly in my report. 10 Q. And I take it you can, in your 11 view, determine whether a dairy farmer was 12 required to market his milk through a DFA 13 controlled entity such as DMS or SMA without 14 inquiring into whether that dairy farmer is a 15 member of SMI; correct? 16 A. SMI, now that you mention it, is a 17 very special case, because there are few, very 18 few farmers who are members of the SMI 19 cooperative, and SMI, as I understand it, is not 20 a Defendant or co-conspirator and its data have 21 not been available to me. But because the 22 entities involved, DFA controlled, SMA, DMS, 23 because they do have market power as 24 traditionally measured, at least 90 percent of</p>
<p style="text-align: right;">Page 95</p> <p>1 Direct and is not marketing through a DFA 2 controlled entity? 3 MR. BROOKHISER: Asked and 4 answered. 5 THE WITNESS: Take an extreme 6 hypothetical. 7 BY MR. KUNEY: 8 Q. How about just the hypothetical I 9 presented? It's not even a hypothetical. 10 A. Well, for part of it -- for one 11 year he may or may not be, but an effect on him 12 is in other years -- the effect on him is very 13 clear, and one only knows this, can assess this, 14 by looking at the area as a whole. 15 His price may be affected by this 16 allegation even while he is a Dean Direct 17 supplier. If you take the leap of faith that 18 Dean is not a Defendant in this particular case 19 and, therefore, DFA has no role or say over what 20 Dean pays the various farmers. 21 Q. Can you decide whether a dairy 22 farmer was required to market through a DFA 23 controlled entity, such as DMS or SMA, without 24 evaluating how that dairy farmer, in fact, sold</p>	<p style="text-align: right;">Page 97</p> <p>1 all dairy farmers go through those two entities 2 in the Southeast. 3 I can conclude that -- and, 4 therefore, they are the ones that determine the 5 prices, I can conclude that all farmers are 6 subject to -- you have to look at the totality 7 to look at the anticompetitive behavior. Just 8 -- and so whether you're doing it for one farmer 9 you still have to look at the totality. Just 10 looking at the individual farmer is not going to 11 tell you anything about the rest of the 12 Southeast. 13 Q. I thought you told me a few 14 minutes ago that I could look at one individual 15 farmer and determine the veracity of the 16 allegation that farmers were required to market 17 their milk through DFA controlled entities? 18 MR. BROOKHISER: Objection. 19 You're mischaracterizing the last 15 minutes of 20 his testimony. 21 MR. KUNEY: I would like to finish 22 the question and you can both say whatever you 23 would like to say. 24 BY MR. KUNEY:</p>

<p style="text-align: right;">Page 98</p> <p>1 Q. DFA controlled entities such as</p> <p>2 DMS or SMA?</p> <p>3 A. You've not been listening to a</p> <p>4 good part of my answer.</p> <p>5 Q. No. I think I have. That may be</p> <p>6 the problem, that I have been listening to the</p> <p>7 answers?</p> <p>8 MR. BROOKHISER: Objection.</p> <p>9 THE WITNESS: If one is doing this</p> <p>10 for an individual farmer, in any event, even if</p> <p>11 you look at his or her circumstances you must</p> <p>12 look at the effect of what happens elsewhere in</p> <p>13 the Southeast to understand why this</p> <p>14 anticompetitive behavior is occurring.</p> <p>15 An individual farmer, whether</p> <p>16 you're doing this for him, let's assume it's a</p> <p>17 him, or for the Class as a whole, it's the same</p> <p>18 set of information.</p> <p>19 I would not be able to, or another</p> <p>20 economist, to look at the effect of</p> <p>21 anticompetitive behavior without looking at the</p> <p>22 totality. Therefore, it is a common proof. I</p> <p>23 need that for the Class. I would need it for an</p> <p>24 individual.</p>	<p style="text-align: right;">Page 100</p> <p>1 why coincidence in a moment, doesn't market</p> <p>2 through DFA, DMS or an entity controlled by</p> <p>3 them, but it doesn't enable one to evaluate in</p> <p>4 his particular circumstances why the access,</p> <p>5 which he had at certain times was limited. That</p> <p>6 has to be examined in the entirety.</p> <p>7 BY MR. KUNEY:</p> <p>8 Q. Is it necessary, in your view in</p> <p>9 evaluating this allegation we've been talking</p> <p>10 about, to find out how many farmers in the</p> <p>11 Southeast, in fact, market their milk not</p> <p>12 through DFA controlled entities?</p> <p>13 A. I've already done that.</p> <p>14 Q. You have done that?</p> <p>15 A. Yes.</p> <p>16 Q. And is it necessary or was it just</p> <p>17 you happened to do it?</p> <p>18 A. Well, it's the inverse of the</p> <p>19 numbers that I have in the report.</p> <p>20 Q. And that's 10 percent you're</p> <p>21 saying is the inverse?</p> <p>22 A. Well, the point in time. That</p> <p>23 number comes from a presentation by SMA which</p> <p>24 was made to -- at the hearing of the USDA in</p>
<p style="text-align: right;">Page 99</p> <p>1 BY MR. KUNEY:</p> <p>2 Q. The sentence from your paragraph</p> <p>3 56 that we began with a few moments ago doesn't</p> <p>4 talk about effect, it talks about the alleged</p> <p>5 wrongdoing. And you wrote that your analysis of</p> <p>6 the alleged wrongdoing, which you agreed as we</p> <p>7 were talking, was determining whether there was</p> <p>8 wrongdoing, could be done with common proof.</p> <p>9 What I'm now hearing you say is</p> <p>10 that with respect to a particular dairy farmer</p> <p>11 you can evaluate whether he was required to</p> <p>12 market his milk through a DFA controlled entity</p> <p>13 such as DMS or SMA without having any</p> <p>14 information about, in fact, how that farmer</p> <p>15 marketed his milk?</p> <p>16 MR. BROOKHISER: Objection.</p> <p>17 There's no question there.</p> <p>18 THE WITNESS: No. If you are</p> <p>19 interested in answering a question how does</p> <p>20 farmer A market his milk over the whole Class</p> <p>21 period, and it may change, you can answer that</p> <p>22 question, and it may turn out in -- for some</p> <p>23 period that an individual farmer, by</p> <p>24 coincidence, and I'll mention -- and the reason</p>	<p style="text-align: right;">Page 101</p> <p>1 2004 or 2005.</p> <p>2 Q. And is that number any different</p> <p>3 in the years after 2004 and 2005?</p> <p>4 A. I don't know specifically, but I</p> <p>5 would expect that the proportion has decreased.</p> <p>6 Q. Increased?</p> <p>7 A. Decreased. That 10 percent is, to</p> <p>8 use a number, maybe 8 percent now. Or to put it</p> <p>9 differently, that the proportion of farmers who</p> <p>10 are involved or required to market through DFA,</p> <p>11 DMS or entities controlled by them has probably</p> <p>12 increased over time.</p> <p>13 Q. Is it your understanding that the</p> <p>14 volume of milk being sold through the Dean</p> <p>15 Directs has decreased since 2004?</p> <p>16 A. Well -- no, it hasn't. Dean</p> <p>17 Directs didn't start in 2004, they started in</p> <p>18 2005, with two farmers.</p> <p>19 Q. And are there more than two</p> <p>20 farmers today, as you understand it?</p> <p>21 A. There are, at least as of --</p> <p>22 everything that is in the -- just to make it</p> <p>23 clear, everything in the present goes no further</p> <p>24 than 2007.</p>

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<p>1 Q. Okay. Were there more by 2007?</p> <p>2 A. There were a grand total of about</p> <p>3 96.</p> <p>4 Q. How many Dairy Fresh independents</p> <p>5 were there at any point during the Class period</p> <p>6 that you're familiar with?</p> <p>7 A. I don't have that information,</p> <p>8 because the data is not available yet, but it's</p> <p>9 small. It's small.</p> <p>10 Q. I'm sorry. I just want to</p> <p>11 understand that penultimate statement.</p> <p>12 You're saying there is not data</p> <p>13 available to you about Dairy Fresh independents?</p> <p>14 A. For the last four or five years,</p> <p>15 yes, there is data.</p> <p>16 Q. Yes, there --</p> <p>17 A. There is data.</p> <p>18 Q. There is data. Okay. So have you</p> <p>19 looked at it and don't remember the number, or</p> <p>20 has it not been necessary to you in the work</p> <p>21 you've done so far to even look at that number?</p> <p>22 A. Well, Dairy Fresh is now NDH, and</p> <p>23 by all the information I have seen NDH would be</p> <p>24 a DFA controlled entity.</p>	<p>1 processing, it's beyond discussion because the</p> <p>2 proportion is so high on both farmers and</p> <p>3 processors that whether there are five more</p> <p>4 Dairy Fresh or a hundred more Dairy Fresh truly</p> <p>5 independent farmers is immaterial.</p> <p>6 Q. And you can't give us an -- or can</p> <p>7 you, give us an estimate or a sense of where you</p> <p>8 as an economist think that line falls?</p> <p>9 A. It depends very much on the</p> <p>10 industry.</p> <p>11 Q. I'm talking about this one. It is</p> <p>12 not an abstract question, it is this one?</p> <p>13 A. But, see, that's of no interest.</p> <p>14 That's of no interest to me. I want to --</p> <p>15 Q. Perhaps --</p> <p>16 A. Perhaps what?</p> <p>17 Q. It may be of interest to some?</p> <p>18 A. Are we interested in what actually</p> <p>19 happened or what --</p> <p>20 Q. I'm interested in just an answer</p> <p>21 to my question, if you have one?</p> <p>22 A. I haven't bothered to think about</p> <p>23 it.</p> <p>24 Q. Do you understand one of the</p>
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<p>1 Q. Oh, I see. So marketing your</p> <p>2 Grade A -- your fluid Grade A milk through a DFA</p> <p>3 controlled entity would include selling it as an</p> <p>4 independent to NDH?</p> <p>5 A. Yes.</p> <p>6 Q. Has that number gone up or down,</p> <p>7 as you understand it, since 2004? The number of</p> <p>8 people who call themselves independents who are</p> <p>9 selling to NDH?</p> <p>10 A. By recall, I don't know.</p> <p>11 Q. At what point does the percentage</p> <p>12 of farmers who are not selling through DFA</p> <p>13 controlled entities, at what point would it</p> <p>14 become great enough that in your opinion it</p> <p>15 would rebut the allegation that's in paragraph</p> <p>16 3(c)?</p> <p>17 A. That's a nifty way of asking the</p> <p>18 question, is there some minimum market share to</p> <p>19 determine whether a firm or a group of firms</p> <p>20 behaving collectively have market power?</p> <p>21 And there is no -- the Courts I</p> <p>22 know have drawn a bright line, economists have</p> <p>23 not, but with the numbers that I have seen, both</p> <p>24 in terms of the marketing of milk and the</p>	<p>1 Plaintiffs' allegations to be that farmers in</p> <p>2 Orders 5 and 7 were foreclosed from the</p> <p>3 opportunity to sell milk to Class 1 plants?</p> <p>4 A. Do I understand the allegation?</p> <p>5 Q. Do you understand that to be one</p> <p>6 of the allegations, the farmers were foreclosed?</p> <p>7 A. Yes.</p> <p>8 Q. And do you understand that to mean</p> <p>9 that farmers were foreclosed from the</p> <p>10 opportunity to sell their milk to Class 1 plants</p> <p>11 at a price less than DFA or the member co-ops at</p> <p>12 SMA were selling their milk?</p> <p>13 MR. BROOKHISER: Can you read that</p> <p>14 question back, please?</p> <p>15 (The record was read as</p> <p>16 requested.)</p> <p>17 THE WITNESS: I don't -- I don't</p> <p>18 understand your question, but if I take it at</p> <p>19 its literal meaning, foreclosure means in the</p> <p>20 case of a monopsony, that the dairy farmers, if</p> <p>21 foreclosed, are foreclosed from having the</p> <p>22 benefits of competition among the processing</p> <p>23 facilities that would otherwise have existed</p> <p>24 and, therefore, sold their milk at a higher</p>

<p style="text-align: right;">Page 106</p> <p>1 price. 2 BY MR. KUNEY: 3 Q. So they're foreclosed from selling 4 their milk at a higher price? 5 A. Yes. 6 Q. Is that your understanding of the 7 allegation? 8 A. That's the way I would interpret 9 it. I have -- do you want to point me to a 10 particular part of the Complaint? We can look 11 at it. 12 But my understanding of 13 foreclosure is that the party foreclosed would 14 be better off in selling milk for less than 15 other similarly situated entities would not be 16 my notion of foreclosure. 17 Q. Would not be? 18 A. No. 19 Q. So the foreclosed dairy farmers, 20 as you understand it, were foreclosed from 21 selling their milk for higher prices than the 22 prices that actually obtained in the market? 23 A. A lot of definitions required 24 there.</p>	<p style="text-align: right;">Page 108</p> <p>1 agreements by themselves are necessarily 2 anticompetitive or a species of any other type 3 of contract. 4 One that you offered was whether 5 the full supply contract is a species of an 6 exclusive contract. 7 Q. Have you investigated the question 8 of the extent to which there were full supply 9 agreements in this industry prior to the alleged 10 Class period? 11 A. There were some. 12 Q. Have you investigated whether 13 there were full supply agreements outside the 14 Southeast during the Class period? 15 A. I've not done a special 16 investigation of that, but through either 17 depositions or reading certain materials I'm 18 aware that full supply agreements were 19 introduced, were used outside of the Southeast. 20 Q. As you understand it are there in 21 some circumstances efficiency justifications for 22 a full supply agreement? 23 A. I haven't seen that kind of 24 language, but there may be gains in efficiency</p>
<p style="text-align: right;">Page 107</p> <p>1 If the allegations in the 2 Complaint are swept away, i.e., there is no 3 behavior that occurs in the but-for marketplace, 4 then farmers would have, if they wished, an 5 opportunity to be with DFA or serve 6 independently, but with more competition for the 7 price of milk the prices to both DFA farmers and 8 to the farmer originally foreclosed would be 9 higher. That's just -- that's a straightforward 10 result from the factual setting of this 11 circumstance, as well as from economics. 12 Q. As you understand it is the -- are 13 the full supply agreements part of the conduct 14 that forecloses dairy farmers from this 15 opportunity? 16 A. Yes. 17 Q. And do you as an economist look at 18 the full supply agreements as a species of 19 exclusive contract? 20 A. As a species? 21 I've just taken at face value. 22 The full supply contract was the means by which 23 foreclosure occurred. I've not analyzed 24 independently whether those full supply</p>	<p style="text-align: right;">Page 109</p> <p>1 by a full supply agreement. But what it denies, 2 both the farmers and the competitors -- the 3 processors in an unfettered marketplace is the 4 benefits of competition. 5 Q. Is it your opinion that all full 6 supply agreements are anticompetitive? 7 A. No. 8 Q. How do you as an economist 9 distinguish between anticompetitive full supply 10 agreements and other full supply agreements? 11 A. Well, I haven't been asked to look 12 at that, but I can give you a preliminary 13 observation. 14 A full supply agreement in the 15 context of what happened is that it foreclosed 16 groups of dairies, dairy farmers, from the 17 benefits of competition or from certain -- 18 certain processors. 19 An example would be Maryland & 20 Virginia. According to Mr. Bryant he had no 21 choice but to become a member of SMA, because 22 with the arrangement between Dean and DFA he no 23 longer had the option for his members to serve 24 the processing facilities that he was serving.</p>

<p style="text-align: right;">Page 110</p> <p>1 MR. KUNEY: Can we go off the 2 record just for a second? 3 THE VIDEOGRAPHER: Going off the 4 record. The time on the video screen is 5 11:55:50. 6 (Discussion off the record.) 7 (Whereupon, at 11:56 a.m., a lunch 8 recess was taken.) 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p>	<p style="text-align: right;">Page 112</p> <p>1 committing to that single source of supply is 2 giving up the benefits that it would have from 3 potential competition in the procurement of 4 Grade A raw milk. 5 Also, there is uncertainty that -- 6 some uncertainty that the supplier who enters 7 into that full supply contract must go somewhere 8 else to secure the full supply. Therefore, 9 there is a risk with foregone benefits, and on 10 the surface it strikes me that is not a rational 11 thing to do -- for a processor to do. 12 Q. As you understand the full supply 13 agreement, if a processor enters into one with 14 an organization like DFA, and someone has to go 15 procure additional milk to provide the 16 processor's needs, who bears that cost? 17 A. The way it's structured now, DFA 18 would. 19 Q. So why wouldn't it be economically 20 rational in an environment where there are 21 seasonal fluctuations in supply and demand for a 22 processor to off-load to the producer the burden 23 of leveling out those seasonal variations? 24 A. If the processor can accomplish</p>
<p style="text-align: right;">Page 111</p> <p>1 AFTERNOON SESSION 2 (12:53 p.m.) 3 THE VIDEOGRAPHER: Going back on 4 the record. The time on the video screen is 5 12:53:13. Please continue. 6 7 EXAMINATION (RESUMED) 8 9 BY MR. KUNEY: 10 Q. Dr. Beyer, take a look if you 11 would at paragraph 42 of your report on the 12 bottom of page 23 and runs over onto page 24. 13 You said before that the Southeast 14 is a deficit region in the sense of milk 15 production being less than milk demand; correct? 16 A. Yes. 17 Q. Okay. Why in paragraph 42 do you 18 state that it would not be economically rational 19 for a processing plant to commit to buying 20 100 percent of raw milk from a single 21 organization that did not possess sufficient 22 supply? 23 A. The principal reason for that 24 statement is that processing plants by</p>	<p style="text-align: right;">Page 113</p> <p>1 that by having dual or multiple sources of 2 supply of raw milk, and thereby gain the 3 advantages of competition in procurement of its 4 raw milk, there's no a priori reason why it 5 would forego that benefit. 6 Q. And does your -- does your 7 statement about giving up benefits of 8 procurement take us back to -- close to where we 9 began this morning with your understanding being 10 that the full supply agreements prevent the 11 processor from procuring a lower cost supply of 12 milk? 13 A. Well, not necessarily, because the 14 MFN clause, which I go on to discuss in my 15 report, in that same paragraph, was a way of 16 protecting the processor and also keeping prices 17 as they were, because DFA -- this is a separate 18 issue, because DFA would be faced with other 19 commitments that it had made if it offered a 20 lower supply. 21 A processor -- I'm having to 22 restate this, but a processor can have sources 23 of supply and enter into contracts with more 24 than one supplier.</p>

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<p>1 Q. If I'm a processor and I sign a 2 full supply agreement with DFA, and I am 3 permitted under the contract to buy from another 4 source of milk if it's cheaper, how have I given 5 up the benefits of competition?</p> <p>6 A. Someone would have to show me that 7 processors were, in fact, looking for 8 alternative sources of supply under these full 9 supply agreements. My understanding is they 10 were not.</p> <p>11 Q. They were not looking for them?</p> <p>12 A. Yes.</p> <p>13 Q. Is it your understanding that they 14 could have accepted an offer from another 15 supplier, other than DFA, if that other supplier 16 offered a lower price?</p> <p>17 A. Right offhand, I don't know. I 18 would have to go back to the supply agreement.</p> <p>19 Q. Don't know. Do you know whether 20 Maryland & Virginia, in the example that you've 21 mentioned a couple of times, ever went to Dean 22 and offered to continue supplying Dean, but at a 23 lower price than DFA was proposing?</p> <p>24 A. I don't know for a fact whether or</p>	<p>1 processor of having alternatives in -- and the 2 benefits of competition, which is not a lower -- 3 which for the processor may be a lower price, 4 but it eliminates from the processor the choices 5 that it can make.</p> <p>6 Q. Is it your view that the full 7 supply agreements that Suiza signed with DFA 8 back in 1998 involved Suiza surrendering the 9 opportunity to get the benefits of competition 10 in the procurement of milk?</p> <p>11 A. I haven't looked at those 12 agreements.</p> <p>13 Q. Is there some reason why those 14 agreements would not involve surrendering the 15 benefits of competition and agreements during 16 the Class period would involve surrendering the 17 benefits of competition?</p> <p>18 A. I have not looked at those 19 agreements. On top of that you're asking me 20 questions about what conduct is or is not 21 anticompetitive, and that is not part of my 22 charge.</p> <p>23 Q. What I have understood to be part 24 of your charge is the assertion that</p>
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<p>1 not they did that.</p> <p>2 Q. Is part -- in your opinion of what 3 makes the full supply agreements anticompetitive 4 that DFA signs full supply agreements with 5 commitments that exceed the production of its 6 own farmer members?</p> <p>7 A. I haven't deemed them to be 8 anticompetitive.</p> <p>9 Q. I see.</p> <p>10 A. Which we went through at some 11 length.</p> <p>12 Q. Does it make a difference in your 13 view, in terms of anything you understand about 14 any of the allegations in the Complaint, if the 15 full supply agreements that DFA signed, the 16 totality of them, were limited to the quantity 17 of milk that DFA members produce?</p> <p>18 A. No, not necessarily.</p> <p>19 The full supply agreement still 20 constrains the choices that a -- under the 21 circumstances that we're looking at where Dean 22 is not truly an entity independent of DFA, and 23 where DFA and its affiliates also have an 24 important role in the marketplace denies the</p>	<p>1 determinations about what conduct is 2 anticompetitive can be made with common proof. 3 You have said that?</p> <p>4 A. Yes.</p> <p>5 Q. And I'm trying to understand how 6 you would make those determinations to help me 7 understand your claim that you can do that with 8 common proof?</p> <p>9 A. I think I -- let me say it one 10 more time. It doesn't matter what the 11 allegation is at this point.</p> <p>12 And what I'm saying is what I said 13 a number of times in response to your questions 14 this morning, that whether for one farmer or 15 several or the Class as a whole, it is necessary 16 to look at what is occurring in the entire 17 marketplace.</p> <p>18 To begin with, no individual 19 farmer is facing a monopsony that would be 20 deemed by economists or others to be other than, 21 if you look at it in isolation, a single 22 relationship between a processor and that 23 farmer.</p> <p>24 The question is, do the Defendants</p>

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<p>1 in this case have market power by the</p> <p>2 appropriately determined means. And the only</p> <p>3 way to look at that is to look at the geography</p> <p>4 as a whole, and that would be done whether one</p> <p>5 farmer says this conduct has harmed me or you do</p> <p>6 it for the Class as a whole, the same thing is</p> <p>7 required. That's a starting point, because</p> <p>8 without market power there cannot be</p> <p>9 anticompetitive conduct from an economist point</p> <p>10 of view. I don't know necessarily from a legal</p> <p>11 point of view, but from an economist point of</p> <p>12 view.</p> <p>13 Q. You're aware, I take it,</p> <p>14 Dr. Beyer, that there are monopolization claims</p> <p>15 in the Plaintiffs' Complaint, as well as</p> <p>16 monopsonization claims? Maybe you're not aware</p> <p>17 of that?</p> <p>18 A. I'm trying to think through the</p> <p>19 many pages of the Amended Consolidated, whatever</p> <p>20 other.</p> <p>21 Q. Corrected.</p> <p>22 A. Corrected Complaint.</p> <p>23 My recollection is that the term</p> <p>24 monopolization is in the Complaint, but I think</p>	<p>1 of measuring or ascertaining whether</p> <p>2 monopolization has occurred or whether the</p> <p>3 Defendants jointly have market power in the</p> <p>4 processing of Class 1 Grade A milk.</p> <p>5 Q. Beyond the issue of whether the</p> <p>6 Defendants have market power are there other</p> <p>7 issues that relate to the allegations of</p> <p>8 monopolization that you are opining can be</p> <p>9 evaluated with common proof?</p> <p>10 A. I don't recall if there are any</p> <p>11 other allegations of monopolization as distinct</p> <p>12 from monopsonization as the market is concerned.</p> <p>13 Q. Let me ask that just so we both</p> <p>14 are clear.</p> <p>15 Is there a distinction in your</p> <p>16 mind between the allegations of monopolization</p> <p>17 in the Complaint and the allegation of</p> <p>18 monopsonization?</p> <p>19 A. There's a distinction in</p> <p>20 economics, and I don't know about how the</p> <p>21 Complaint sets it out. I mean, I can recall</p> <p>22 some of it, but I wasn't looking to the</p> <p>23 Complaint for that distinction.</p> <p>24 For monopsony –</p>
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<p>1 it is used interchangeably with monopsony.</p> <p>2 Q. Do you have an understanding of</p> <p>3 what the Plaintiffs allege to have been the</p> <p>4 behavior that constituted unlawful</p> <p>5 monopolization by the Defendants?</p> <p>6 A. Well, there is one dimension.</p> <p>7 That is acquisition of the market power in the</p> <p>8 processing of Class 1 milk, and the process of</p> <p>9 getting to the point of having both market share</p> <p>10 and then satisfying the other considerations</p> <p>11 about monopolization, which I discuss, is –</p> <p>12 involves a series of steps that Defendants</p> <p>13 jointly undertook for the monopolization of the</p> <p>14 processing side of the Class 1 drinkable milk.</p> <p>15 Q. Do you -- do you explain somewhere</p> <p>16 in your report whether you can evaluate the</p> <p>17 allegation that the Defendants were involved in</p> <p>18 unlawful monopolization by the use of common</p> <p>19 proof?</p> <p>20 A. I don't understand your term,</p> <p>21 value. Didn't you say?</p> <p>22 Q. Evaluate?</p> <p>23 A. Oh, evaluate.</p> <p>24 I only discuss that in the context</p>	<p>1 Q. That one, yeah?</p> <p>2 A. That side. It's catching.</p> <p>3 The ultimate claims are that the</p> <p>4 Defendants collectively have market power in the</p> <p>5 purchase of Grade A raw milk, and I've looked at</p> <p>6 the various measures of that, an economist would</p> <p>7 look to, and concluded that structurally</p> <p>8 monopsonization -- don't ask me to say it</p> <p>9 again -- has been evaluated, to use your term.</p> <p>10 The same thing is done on the market power,</p> <p>11 which you could call monopolization of the</p> <p>12 processing plants. I'm interested in market</p> <p>13 power. Do the Defendants collectively have</p> <p>14 market power in the relevant defined markets?</p> <p>15 If they do then the conduct alleged needs to be</p> <p>16 evaluated. If they don't it seems to me it</p> <p>17 becomes a moot point.</p> <p>18 Q. And if they do have market power</p> <p>19 is it your opinion that the conduct that has</p> <p>20 been alleged to amount to unlawful</p> <p>21 monopsonization can be examined with common</p> <p>22 proof?</p> <p>23 A. Yes, I believe it has to.</p> <p>24 Q. And what, as you understand it,</p>

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<p>1 what is the conduct that is alleged to 2 constitute unlawful monopsonization? 3 A. Well, there are a variety of 4 alleged unlawful conduct or behaviors. We 5 talked about one of them before lunch, which is 6 foreclosure of dairy farmers to marketing of 7 their milk, except through DFA, DMS or DFA 8 affiliated institution. Another would be that 9 DFA, using SMA as the institutional vehicle, and 10 this is the allegations, arranged for imports 11 from the Southwest which were for certain 12 periods of time in excess of the needs of the 13 Southeast and also related to that for certain 14 periods of time where the Southeast producers, 15 the dairy farmers, paid the costs in effect of 16 the imports from the Southwest. 17 I may not have all of the alleged 18 allegations at the tip of my tongue, but these 19 and others would be -- would be under the 20 evaluation of whether they are to be 21 anticompetitive -- an evaluation done, by the 22 not by an economist necessarily, but by others 23 would have to be -- you -- because you begin by 24 necessity with the market power determined for</p>	<p>1 been using today, through this flooding 2 allegation? 3 A. Because there were -- I can only 4 say that it would be done because the 5 monopsonists gained from that arrangement. 6 Q. And do you have some understanding 7 of how even though monopsonists ordinarily try 8 to restrict quantity, in this case the 9 monopsonists, are alleged to have gained by 10 expanding quantity? 11 A. Actions wouldn't be taken without 12 one or more of the Defendants gaining. One 13 would need to ask them why did you do it. I 14 can't intuit why they did it. 15 Q. Do you see in your evaluation of 16 the case to date any economic motivation or 17 incentive for the alleged monopsonists in the 18 Southeast to have increased supply by bringing 19 in more milk than was needed from outside the 20 region? 21 A. I would only get into speculation. 22 Q. In the continuation of paragraph 23 42 you mention the MFN clauses, which I think 24 you started to talk about a moment ago, and you</p>
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<p>1 the area as a whole, it is only in that context 2 that the conduct or the behavior can be 3 evaluated. 4 There are a variety of reasons why 5 that is the case. 6 Q. You mentioned the foreclosure of 7 dairy farmers, and I want to make sure I've 8 asked this question not just about Maryland & 9 Virginia. 10 Are you aware of any situation in 11 which a dairy farmer has been foreclosed from 12 selling his milk to a party to a full supply 13 agreement at a lower price than DFA was selling 14 its milk? 15 A. That specific circumstance I'm not 16 aware. 17 Q. Is it -- is it typically the case 18 that monopsonists reduce output? 19 A. By economic theory they would, 20 yes. 21 Q. Why, as you understand it, did the 22 monopsonists, the alleged monopsonists in this 23 case bring in excess supply to the market 24 through this flooding, to use the term we've</p>	<p>1 say in paragraph 43, "the result of these 2 clauses was in effect to fix prices for a 3 majority of processing plants within the 4 Southeast . 5 What did you mean when you wrote, 6 the result was in effect to fix prices? 7 A. When DFA established this MFN 8 where it had full supply contracts, the price at 9 which it was selling de facto became the floor 10 price. 11 Q. Became the? 12 A. The floor price for DFA supplied 13 milk, because if there were any lower price 14 by -- offered by DFA it would affect all other 15 processing plants that it supplied. And because 16 of the affiliation of DMS, which is DFA 17 controlled, and NDH, which is DFA controlled, 18 would soon become common knowledge and applied 19 to all processing plants. Therefore, 20 effectively de facto DFA's actions through the 21 MFN clause, whatever the prices were, was the 22 price for the entire Southeast region. 23 Q. Is it, as you've evaluated the 24 market to date, is it your understanding that</p>

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<p>1 DFA sought the inclusion of the MFNs in its full 2 supply agreements?</p> <p>3 A. Whether it did or not, and it 4 could have been, either party is immaterial, as 5 far as I'm concerned. The result of the MFN 6 clause is as I've just described it.</p> <p>7 Q. Am I -- am I understanding your 8 report and your testimony that one of the 9 consequences of having multiple MFNs is that if 10 DFA gives a price reduction to any one of its 11 customers it will end up having to give the same 12 price reduction to everybody?</p> <p>13 A. No. That's not what I just 14 described.</p> <p>15 If DFA to one processor provides 16 at a given point in time a price which it does 17 not give to the other DFA supply and processors, 18 but with whom it has this Most Favored Nation 19 clause, then DFA contractually anyway is 20 compelled to offer that lower price to all of 21 its plants.</p> <p>22 And since -- just an extension 23 here, since DMS and NDH are DFA controlled 24 entities it will soon become apparent that that</p>	<p>1 about the clauses that you say do exist?</p> <p>2 A. No. I was talking about the 3 allegations of the anticompetitive conduct and 4 the market power which necessarily emanates from 5 the structure of these Defendants.</p> <p>6 If those conditions are not 7 present for import in a but-for marketplace, 8 even with MFN clause the matching of upward 9 prices is likely to occur in a competitive 10 marketplace.</p> <p>11 What happens in the marketplace as 12 it is, as it was during this period of time, 13 with the structural conditions of the 14 anticompetitive conduct in place, I can't 15 determine that because that is something that's 16 effectively determined by the cartel, the 17 alleged cartel.</p> <p>18 Q. So you're saying you can't tell me 19 whether as a result of the MFN clauses in the 20 marketplace that existed if DFA agreed to a 21 higher price with one of its processor customers 22 whether as a result of the MFNs that would 23 become the market price? You can't answer that 24 question?</p>
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<p>1 same credit or discount, or however you want to 2 describe it, becomes de facto, the price 3 applying to these others so that the price that 4 DFA with these MFN sets for one processor 5 becomes the price in the entire marketplace, or 6 at least in the share of the marketplace that 7 the Defendants jointly control.</p> <p>8 Q. Would that be true if DFA raised 9 the price to one particular processor? Would 10 that increased price also become de facto, the 11 market price as a result of what you understand 12 to be the effect of these MFN clauses?</p> <p>13 A. With or without this?</p> <p>14 Q. With?</p> <p>15 A. That question would have to be 16 addressed. Easily answered, if these conditions 17 did not exist then my response is other 18 processors would need to match DFA, just in the 19 nature of the marketplace working.</p> <p>20 Q. Your report, as I understand it, 21 says that these clauses do exist; correct?</p> <p>22 A. Yes.</p> <p>23 Q. So I'm not trying now to ask about 24 some hypothetical situation. I'm trying to ask</p>	<p>1 A. No, I can't. Because the cartel 2 is in place and it's the cartel, a joint 3 decision about how far and how wide and what 4 extent that price increase is going to ramify.</p> <p>5 Q. Well, if there is a cartel setting 6 the prices why does anyone even need an MFN? 7 Why don't they just agree on prices and 8 implement their agreement?</p> <p>9 A. Are you asking me a theory?</p> <p>10 Q. I'm asking you --</p> <p>11 A. That question should be posed to 12 the actual alleged cartel members.</p> <p>13 Q. Well, is it your opinion, based on 14 your evaluation of the market to date, that the 15 MFN clauses actually had no effect because they 16 took place in an environment in which there was 17 an existing functioning cartel?</p> <p>18 A. No. You're confusing things.</p> <p>19 Q. I'm listening to you.</p> <p>20 MR. BROOKHISER: Objection, move 21 to strike.</p> <p>22 THE WITNESS: Do you want to argue 23 a bit about this?</p> <p>24 BY MR. KUNEY:</p>

<p style="text-align: right;">Page 130</p> <p>1 Q. No.</p> <p>2 A. Then stop those comments.</p> <p>3 The MFN clause was put into place</p> <p>4 by either the purchaser or the seller of the</p> <p>5 Grade A raw milk in order to protect the</p> <p>6 processor, ostensibly, in the event of a lower</p> <p>7 price that DFA charged to a competitive</p> <p>8 "processor".</p> <p>9 There was no need for MFN clause</p> <p>10 in terms of higher price because the processor,</p> <p>11 all things considered, is not going to be</p> <p>12 concerned about that. So the -- what is of</p> <p>13 interest here to the processors is to have this</p> <p>14 MFN clause.</p> <p>15 The fact of the matter is, once</p> <p>16 it's in place the consequences are as I</p> <p>17 described. It establishes a price that all</p> <p>18 DFA -- DFA itself and all DFA controlled</p> <p>19 entities, de facto are going to use as a floor.</p> <p>20 Because if DFA goes below that price all DFA</p> <p>21 processors or DFA affiliated processors will</p> <p>22 have to follow suit.</p> <p>23 Q. Is it your understanding of the</p> <p>24 allegations that each of the processors that was</p>	<p style="text-align: right;">Page 132</p> <p>1 priced accordingly.</p> <p>2 Now, whether or not the processors</p> <p>3 communicated what they were -- they were not</p> <p>4 going to look to alternatives, I don't know, but</p> <p>5 it's not really necessary.</p> <p>6 Q. You've offered the opinion in your</p> <p>7 report and earlier today that the alleged</p> <p>8 wrongdoing could be evaluated by common proof.</p> <p>9 Question, as you understand it,</p> <p>10 does part of the alleged wrongdoing that you are</p> <p>11 opining can be evaluated by common proof include</p> <p>12 that the processors communicated with each other</p> <p>13 and through those communications agreed on what</p> <p>14 price they would pay for raw milk?</p> <p>15 A. To get to the core issue, is there</p> <p>16 common proof necessary. Let's assume that they</p> <p>17 did, whether for one dairy farmer or for the</p> <p>18 Class as a whole, the same way of assessing</p> <p>19 whether that alleged anticompetitive behavior</p> <p>20 occurred would be the same.</p> <p>21 Q. I understand that if it were a</p> <p>22 price fixing case you might be able to evaluate</p> <p>23 it by common proof.</p> <p>24 My question is, as you understand</p>
<p style="text-align: right;">Page 131</p> <p>1 party to a full supply agreement with DFA knew</p> <p>2 that other processors had contracts with MFN</p> <p>3 clauses?</p> <p>4 A. I don't know the answer to that.</p> <p>5 Q. Is it your understanding of how</p> <p>6 this marketplace is alleged to have functioned</p> <p>7 that Dean, for example, would have wanted NDH to</p> <p>8 have MFN in its full supply agreement with DFA?</p> <p>9 A. I don't know the answer to that.</p> <p>10 Q. As you understand what the</p> <p>11 Plaintiffs are alleging are they alleging that</p> <p>12 the processor Defendants communicated with each</p> <p>13 other and agreed about the prices that they were</p> <p>14 going to pay for raw milk?</p> <p>15 A. I don't believe so, but that's</p> <p>16 again beyond my scope of analysis. Given the</p> <p>17 way Grade A raw milk is marketed and given the</p> <p>18 institutional structure ownership of various</p> <p>19 entities in the marketplace and the way in which</p> <p>20 prices that the entities establish, not the</p> <p>21 processors, but the entities, DFA, MSA, the</p> <p>22 various -- and DMS, effectively the price was</p> <p>23 known throughout the marketplace because such a</p> <p>24 large proportion of the milk being provided was</p>	<p style="text-align: right;">Page 133</p> <p>1 the Plaintiffs' allegation are they alleging</p> <p>2 price fixing in the form of the processors</p> <p>3 communicating with each other and agreeing on</p> <p>4 the price they would pay for raw milk, yes or</p> <p>5 no?</p> <p>6 A. By my memory, I don't recall that,</p> <p>7 but let me just -- in any of that, and this is</p> <p>8 my prior answer is relevant here, even if it is</p> <p>9 it needs -- it can only be assessed through</p> <p>10 common proof. And, again, I've asked the</p> <p>11 question, would the same information be</p> <p>12 necessary whether it's for a single farmer or</p> <p>13 for the Class as a whole, and my conclusion, if</p> <p>14 that is an allegation it would be.</p> <p>15 Q. Is it your understanding that milk</p> <p>16 that was sold through DMS was subject to an MFN?</p> <p>17 A. I don't believe it was.</p> <p>18 Q. Would milk being sold by DMF</p> <p>19 shippers to Dean at a lower price than DFA was</p> <p>20 charging its customers trigger some DFA</p> <p>21 obligation under the MFN?</p> <p>22 A. In this hypothetical situation</p> <p>23 that you've designed, no.</p> <p>24 Q. Would not?</p>

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<p>1 A. If it's a hypothetical situation.</p> <p>2 Q. How do you know that?</p> <p>3 A. Look at the prices I put in my</p> <p>4 report. Over time the DMS price and the DFA</p> <p>5 price are almost identical for 100 weight</p> <p>6 Grade A raw milk.</p> <p>7 Q. Is it your understanding,</p> <p>8 Dr. Beyer, that the Plaintiffs are alleging that</p> <p>9 the full supply agreements with the MFN clauses</p> <p>10 had the effect of fixing prices?</p> <p>11 A. I don't believe so, but now you're</p> <p>12 probing my memory. If you ask me as an</p> <p>13 economist, the full supply agreements became an</p> <p>14 instrument in the total fabric of the</p> <p>15 monopsonization that did occur, but I don't look</p> <p>16 at a full supply agreement necessarily as a</p> <p>17 vehicle by which it is the proxy, so to speak,</p> <p>18 for agreement among the parties to fix prices.</p> <p>19 Q. I'm sorry. I didn't hear that</p> <p>20 last part?</p> <p>21 A. It is not necessarily -- the full</p> <p>22 supply agreement is not necessarily a proxy.</p> <p>23 Q. Not necessarily, okay.</p> <p>24 Is it your understanding that NDH</p>	<p>1 course, is the same -- flip side of the coin.</p> <p>2 As a result -- the Plaintiffs say</p> <p>3 as a result of the allegations the dairy farmers</p> <p>4 were paid less for their milk than they would</p> <p>5 have been paid in a situation absent these</p> <p>6 allegations.</p> <p>7 Q. The dairy farmers were paid less.</p> <p>8 Okay.</p> <p>9 Why, as you understand the</p> <p>10 Complaint, would DFA want dairy farmers to be</p> <p>11 paid less for their milk?</p> <p>12 A. That's a good question. I'm not</p> <p>13 part of the Executive Committee of DFA, so I</p> <p>14 don't know.</p> <p>15 Q. Is there anything in the Complaint</p> <p>16 that informed you of at least of the allegations</p> <p>17 as to why DFA would want dairy farmers to get</p> <p>18 paid less money?</p> <p>19 A. It is not necessarily DFA</p> <p>20 management wanted -- desired dairy farmers to be</p> <p>21 paid less. It is nonetheless a consequence of</p> <p>22 actions that DFA took. Those consequences</p> <p>23 evolve from a number of things that we've</p> <p>24 already discussed today, foreclosure of farmers</p>
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<p>1 has a full supply agreement with DFA?</p> <p>2 A. As I'm sitting here I just can't</p> <p>3 remember. I believe so, but I can't say for</p> <p>4 certain.</p> <p>5 Q. Can you -- can you explain to us</p> <p>6 how it is that the Dairy Fresh NDH plants come</p> <p>7 to procure milk from independents,</p> <p>8 notwithstanding what you understand to be a full</p> <p>9 supply agreement between NDH and DFA?</p> <p>10 A. Well, NDH procures milk for -- at</p> <p>11 least for the years for which we have the data</p> <p>12 from some independents. I believe that they</p> <p>13 operate through DMS, but I can't be absolutely</p> <p>14 certain of that, and for farmers that are not</p> <p>15 aligned either with DFA or other cooperative and</p> <p>16 in turn with SMA and are truly independent.</p> <p>17 They have to be a small part of the total.</p> <p>18 Q. I take it from a number of</p> <p>19 responses you've given that you do understand</p> <p>20 the Plaintiffs' allegations to be that as a</p> <p>21 result of the alleged conduct, processors paid</p> <p>22 less for milk than they otherwise would have?</p> <p>23 A. Put it the other way, the way the</p> <p>24 Complaint is stated, although the flip coin, of</p>	<p>1 that are not DFA farmers, but other farmers.</p> <p>2 The ultimate importing of excess milk through</p> <p>3 SMA into the Southeast through a variety of --</p> <p>4 laid out in the Complaint of actions that in</p> <p>5 effect, according to the Complaint, utilized DFA</p> <p>6 moneys that would have otherwise gone to farmers</p> <p>7 in the Southeast, DFA farmers. In those</p> <p>8 allegations there may be seven or eight of them,</p> <p>9 and it goes through some of the breach of</p> <p>10 contract claims. So DFA, in effect, has been</p> <p>11 operating at multiple levels and it has</p> <p>12 different objectives, depending on which level</p> <p>13 it's operating on.</p> <p>14 Q. As you understand the allegations</p> <p>15 in the Complaint are the Plaintiffs alleging</p> <p>16 that, for example, DFA was involved in the</p> <p>17 bringing of excess milk in from the Southwest</p> <p>18 for the purpose of getting Southeastern dairy</p> <p>19 farmers to be paid less for their milk?</p> <p>20 A. I don't recall offhand that the</p> <p>21 Complaint is worded in that manner, that</p> <p>22 assuming there was excess milk and DFA had a</p> <p>23 role in it, which I believe they did, the way</p> <p>24 the organizations are structured, that it was</p>

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<p>1 done with that intent. That may be one of the</p> <p>2 consequences.</p> <p>3 Q. Is it your understanding that the</p> <p>4 allegations in the Complaint are that SMA was</p> <p>5 involved in conduct with the purpose of driving</p> <p>6 down the payments to dairy farmers in the</p> <p>7 Southeast?</p> <p>8 A. I don't recall that being part of</p> <p>9 the allegations.</p> <p>10 Q. You're familiar with DCMA?</p> <p>11 A. Yes.</p> <p>12 Q. There's lots of acronyms floating</p> <p>13 around. You're familiar with DCMA?</p> <p>14 A. Yes.</p> <p>15 Q. What do you understand DCMA to be?</p> <p>16 A. DCMA is -- it has the word</p> <p>17 cooperative in its name. I think it is a</p> <p>18 cooperative by the way it's organized. It has</p> <p>19 the role by those who use it, which would be all</p> <p>20 of Order 5 and 7, to establish over order</p> <p>21 premium for Orders 5 and 7. They do it for</p> <p>22 other areas where DFA has an important role, but</p> <p>23 they do do that for Orders 5 and 7.</p> <p>24 Q. And as you understand the</p>	<p>1 My question is, based on your</p> <p>2 understanding of the market can you help us</p> <p>3 understand how one can allege that SMA and DFA</p> <p>4 were participants in conduct that drove down the</p> <p>5 prices paid to dairy farmers in the Southeast</p> <p>6 and DCMA was not? Can you help us on that?</p> <p>7 MR. BROOKHISER: Are you asking --</p> <p>8 I'm going to object. If you're asking him what</p> <p>9 the Complaint says, that's one thing. If you're</p> <p>10 asking him why the Complaint doesn't say</p> <p>11 something, that's another thing. If you're</p> <p>12 asking something totally different, that's a</p> <p>13 third thing.</p> <p>14 BY MR. KUNEY:</p> <p>15 Q. I'm asking something totally</p> <p>16 different. Based on how the market looks. I'm</p> <p>17 not asking what was in the minds of the</p> <p>18 drafters. Based on how Dr. Beyer understands at</p> <p>19 present the market functions and the roles of</p> <p>20 these various participants, can you explain how</p> <p>21 it could be the case that SMA and DFA could be</p> <p>22 involved in the alleged anticompetitive conduct</p> <p>23 and DCMA was not?</p> <p>24 A. Yes. This could be a benign set</p>
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<p>1 marketplace is DCMA a participant in the conduct</p> <p>2 that foreclosed opportunities for dairy farmers</p> <p>3 in the Southeast to enjoy the benefits of</p> <p>4 competition?</p> <p>5 A. I don't -- I'm not in the process</p> <p>6 of identifying who are Defendants and</p> <p>7 co-conspirators. DCMA is identified by the</p> <p>8 Plaintiffs as being a Defendant in this matter,</p> <p>9 of having been an integral part of the price</p> <p>10 setting in determination for dairy farmers, the</p> <p>11 prices at which they sell their milk in the</p> <p>12 Southeast.</p> <p>13 Q. And, Dr. Beyer, you're welcome to</p> <p>14 take a look at the Corrected Amended</p> <p>15 Consolidated Complaint, if you wish. It's</p> <p>16 sitting there in front of you, but I'll</p> <p>17 represent that DCMA is, in fact, not a</p> <p>18 Defendant?</p> <p>19 A. Is it a co-conspirator?</p> <p>20 Q. You are welcome to look for that,</p> <p>21 too, if you'd like?</p> <p>22 A. You could save me the time by</p> <p>23 answering that question.</p> <p>24 Q. No.</p>	<p>1 of circumstances.</p> <p>2 DCMA had a Board. The Board</p> <p>3 ultimately set the premium or premiums.</p> <p>4 The Board was in effect majority</p> <p>5 DFA.</p> <p>6 The Board also looked to -- at one</p> <p>7 staff member in the firm, that is Mr. Sims and</p> <p>8 his consulting firm. The same staff member,</p> <p>9 same consulting firm that SMA had. There are</p> <p>10 some tight relationships so that -- and they are</p> <p>11 tight enough in my judgment that DCMA is not</p> <p>12 operating independent of the Defendants in this</p> <p>13 matter.</p> <p>14 Q. Are the -- as you understand it</p> <p>15 over order premiums announced by DCMA part of</p> <p>16 the conduct that, as you understand it, results</p> <p>17 in dairy farmers getting paid less for their</p> <p>18 milk than they otherwise would have?</p> <p>19 A. Yes.</p> <p>20 Q. As you understand it, Dr. Beyer,</p> <p>21 are the Plaintiffs alleging that the processor</p> <p>22 Defendants agreed not to compete in the purchase</p> <p>23 of raw milk?</p> <p>24 A. This is very -- frankly, similar</p>

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<p>1 to a set of questions you asked me just after 2 lunch break about prices. 3 The answer is, I don't know, but 4 effectively it does not matter because the raw 5 milk, Grade A raw milk, marketed to the 6 processors who were owned predominantly by the 7 Defendants in this case, are one in the same. 8 MR. KUNEY: I'm sorry. Could I 9 get our that last two sentences back, please? 10 (The record was read as 11 requested.) 12 MR. KUNEY: Why don't we go ahead 13 and go off. 14 THE VIDEOGRAPHER: Here marks the 15 end of videotape number two taken in the 16 deposition of Dr. John Beyer. Going off the 17 record. The time on the monitor is 13:42:11. 18 (A brief recess was taken.) 19 THE VIDEOGRAPHER: Here marks the 20 beginning of videotape number three, taken in 21 the deposition of Dr. John Beyer. Going back on 22 the record. The time on the video screen is 23 13:55:49. Please continue. 24 BY MR. KUNEY:</p>	<p>1 marketing and sale of raw milk. 2 Q. Why did, as you understand it, why 3 did Dean enter into the outsourcing agreement? 4 A. I'm not sure that I've seen 5 testimony or documents that relate directly to 6 that. All I know is that it occurred. 7 Q. What functions, as you understand 8 it, did Dean shift to DMS through the 9 outsourcing agreement? 10 A. My understanding is that farmers 11 who had been selling their milk directly to 12 Dean, so-called independents, were now selling 13 their milk or having their milk marketed to 14 DMS -- through DMS to Dean so DMS became the 15 marketing agent on behalf of these independents 16 and for Dean. 17 Q. Did DMS, as you understand it, 18 take over any functions that prior to the 19 outsourcing agreement had been performed by Dean 20 itself? 21 A. Most of the functions were 22 performed by Dean directly, such as the 23 accounting, the -- arranging for the collection 24 of the milk, the payment of the milk to the</p>
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<p>1 Q. Dr. Beyer, turn if you would to 2 paragraph 44 of your report. It's on page 24 3 and over onto 25. Do you have that in front of 4 you? 5 A. Yes. 6 Q. And that paragraph is about an 7 agreement between Dean and DMS; correct? 8 A. Basically, it's about the 9 formation of DMS, but because DMS is -- became 10 the supplier to Dean for the independents it 11 involves basically an arrangement between Dean 12 and DMS. 13 Q. And you're familiar, I take it, 14 with what you referred to in paragraph 44 as the 15 outsourcing agreement? 16 A. Yes. 17 Q. Is the outsourcing agreement, as 18 you understand it, part of the alleged 19 anticompetitive conduct in this case? 20 A. It is -- from my perspective -- I 21 don't recall specifically from the Complaint, 22 but from my perspective as an economist it is 23 part of the conduct required or that was used by 24 DFA to establish its market power in the</p>	<p>1 farmers -- for the milk to the farmers. All 2 those functions became functions of DMS when 3 that outsourcing occurred. 4 Q. Okay. You write towards the 5 bottom of page 24, three lines up from the 6 bottom, "the agreement capped the amount Dean 7 agreed to pay for raw milk." Do you see that? 8 A. Yes. 9 Q. And were you referring to the 10 price that Dean paid to DMS that that's what was 11 capped? 12 A. Could you repeat that question? 13 Q. Yes. Were you referring with that 14 language to the price Dean paid to DMS? 15 A. Yes. Not for its services, but 16 for the payment to the farmers through DMS. 17 Q. Now I take it you meant what you 18 said here, which is at least at the time you 19 wrote the report you understood that this 20 agreement put a cap on the amount that Dean 21 would pay; correct? 22 A. Yes. 23 Q. Is that still your understanding 24 today?</p>

<p style="text-align: right;">Page 146</p> <p>1 A. As it was -- as the price was 2 periodically revised or over order premiums 3 applied, that DMS agreed to bill Dean for and 4 then presumably in turn paid to the farmers. 5 Q. But the language here that you 6 describe as an a cap, is it first of all still 7 your understanding that language is indeed a 8 cap? 9 A. At the time it was done it was. 10 It wasn't until volume and quality premiums were 11 introduced by DMS and DFA at the same time, more 12 or less, that there were changes. And, of 13 course, the order prices would change from 14 period to period. 15 Q. So am I correct in understanding 16 your view of that contract is Dean agreed to a 17 cap and that cap was the Federal minimum blend 18 price in that particular area? Is that how you 19 understood it? 20 A. Though over time, as I've said, 21 there are premiums that were billed by DMS and 22 which Dean agreed to pay. 23 Q. Without changing this language? 24 A. That's my understanding, yes.</p>	<p style="text-align: right;">Page 148</p> <p>1 A. I don't recall where, but over 2 order premiums are discussed. 3 Q. Over order premiums between Dean 4 and DMS. Is there someplace in your report 5 where you say, notwithstanding what I said in 6 paragraph 44 about there being a cap at Federal 7 minimum, in fact, Dean not long thereafter 8 agreed to pay premiums? 9 A. Would you like to write my report? 10 Q. I would just like to know what's 11 in there, Dr. Beyer. 12 A. I haven't used language like that, 13 but it is. 14 It is on pages 35 and 36 where it 15 is discussed, both DMS' process, as well as DFA. 16 Q. And if you would point me to the 17 language on 35 or 36 where you say that Dean 18 paid premiums to DMS shippers, notwithstanding 19 the language of this agreement you referenced 20 earlier? 21 A. There's not language to that 22 effect, but it's clear from this discussion and 23 the reference to the invoices, and if you see 24 the invoice, which is just DMS' invoice to Dean</p>
<p style="text-align: right;">Page 147</p> <p>1 Q. And when did that happen? 2 A. The first change occurred shortly 3 after DMS entered into -- after DMS was in 4 place. 5 Q. I see. Did -- do you mention 6 somewhere in your report that the cap was short 7 lived because not long after DMS was put in 8 place Dean, in fact, did agree to pay premiums 9 above the Federal minimum? 10 MR. BROOKHISER: Object. That 11 misstates his testimony. 12 THE WITNESS: The cap may still 13 have been in place, but Dean and DMS agreed that 14 there would be premiums -- over order premiums 15 of certain quantities for certain purposes 16 established. 17 BY MR. KUNEY: 18 Q. And is that last statement that 19 you just made, that Dean and DMS subsequently 20 agreed that there could be over order premiums 21 for certain purposes reflected anywhere in the 22 text of your report? 23 A. Oh, yes. 24 Q. Where does it say that?</p>	<p style="text-align: right;">Page 149</p> <p>1 for a particular month and particular processing 2 facility, there is a volume and quality premium 3 that DMS bills, invoices Dean for. 4 I don't have -- we still don't 5 have the final payment data -- I didn't at the 6 time I was putting this together, of what Dean 7 actually paid for milk that it received. 8 We have data that states what the 9 invoices showed. There was the same set of 10 material as here, but we don't have a statement 11 for all the periods of what Dean actually paid 12 for the milk that it bought from DMS. 13 Q. How soon after January 2003 did 14 DMS shippers begin receiving premiums, 15 notwithstanding the -- what you describe as a 16 cap in paragraph 44 of your report? 17 A. Probably fairly soon. I -- 18 without going back to all the invoices and 19 looking at them, the timing is just from memory, 20 but given the dates of the various indication -- 21 of the various communications here, it would be 22 very soon after that. 23 Q. Very soon after the cap had turned 24 out not to be a cap, because they were paying</p>

<p style="text-align: right;">Page 150</p> <p>1 premiums?</p> <p>2 MR. BROOKHISER: Object,</p> <p>3 mischaracterizes his prior testimony.</p> <p>4 THE WITNESS: I'll let my prior</p> <p>5 answer stand.</p> <p>6 BY MR. KUNEY:</p> <p>7 Q. Fine.</p> <p>8 Are you aware of a regulatory</p> <p>9 requirement that independent farmers cannot be</p> <p>10 paid less than the Federal uniform price?</p> <p>11 A. Yes.</p> <p>12 Q. And what is the connection, if</p> <p>13 any, as you understand it, between the language</p> <p>14 in the Dean DMS agreement about what independent</p> <p>15 shippers have to be paid and what the -- let me</p> <p>16 start that again.</p> <p>17 What is the relationship, if any,</p> <p>18 as you understand it, between the regulatory</p> <p>19 requirement about minimum payments to</p> <p>20 independent shippers and the agreement between</p> <p>21 Dean and DMS about what the DMS shippers would</p> <p>22 be paid?</p> <p>23 A. There's a big difference.</p> <p>24 The regulation is that independent</p>	<p style="text-align: right;">Page 152</p> <p>1 the invoices or the payment -- payroll records</p> <p>2 to DMS farmers, to answer the specific question.</p> <p>3 Q. Have you looked at the payroll</p> <p>4 records to see if they're consistent with your</p> <p>5 suggestion that Dean had agreed to a cap whereby</p> <p>6 it would pay no more than the Federal minimum?</p> <p>7 A. Yes.</p> <p>8 Q. And what did you find?</p> <p>9 A. There's one right here in my</p> <p>10 report.</p> <p>11 Q. That it's not consistent?</p> <p>12 A. No. It pays the Federal minimum</p> <p>13 for the skim price and the butter fat.</p> <p>14 The over order premium, to the</p> <p>15 extent it applies, for example, we just at</p> <p>16 random pulled out a payroll stub for a</p> <p>17 particular farmer, reflects, I think, both the</p> <p>18 volume premium and partially the quality</p> <p>19 premium.</p> <p>20 Q. When you say, over order premium</p> <p>21 in the same sentence that includes the phrase</p> <p>22 "payroll stub" what do you mean?</p> <p>23 A. It can be interpreted in two</p> <p>24 different ways and I describe that in my report,</p>
<p style="text-align: right;">Page 151</p> <p>1 farmers will be paid no less than, whereas this</p> <p>2 agreement is that Dean will pay DMS no more</p> <p>3 than. That word more and less is the difference</p> <p>4 between night and day.</p> <p>5 Q. Then is it your understanding of</p> <p>6 the record of this case that, in fact, Dean and</p> <p>7 DMS behaved as if they had agreed that Dean</p> <p>8 would pay no more than the Federal minimum?</p> <p>9 A. That's the agreement that</p> <p>10 initially worked out. Modifications to that</p> <p>11 agreement and reality to the agreement and</p> <p>12 practice were when certain pricing changes were</p> <p>13 introduced in the marketplace, as reflected on</p> <p>14 pages 35 and 36 for the volume and quality</p> <p>15 premiums, over order premiums, that DMS invoiced</p> <p>16 Dean for those premiums and presumably Dean</p> <p>17 paid.</p> <p>18 Q. Well, have you looked at the</p> <p>19 payroll records of DMS shippers to see when they</p> <p>20 began receiving premiums above Federal minimum?</p> <p>21 A. I have looked at some payroll</p> <p>22 records. I've looked at them in the aggregate,</p> <p>23 because they are reflected in a variety of</p> <p>24 places in my report, but I have not looked at</p>	<p style="text-align: right;">Page 153</p> <p>1 and I present the data for that two different</p> <p>2 ways in my report.</p> <p>3 The way in which it is in the</p> <p>4 industry appears to be most commonly referred to</p> <p>5 is any price, it could be positive or negative,</p> <p>6 but I'll put it when you actually do it, above</p> <p>7 and beyond the order minimum, so it is the -- if</p> <p>8 you were looking at an individual farmer it</p> <p>9 would be gross pay to the farmer, less the</p> <p>10 Federal order minimum, and any positive</p> <p>11 difference between the two would be an over</p> <p>12 order premium.</p> <p>13 Now, generally to the extent that</p> <p>14 occurs it is for premia that I consider would be</p> <p>15 in place with or without the conspiracy, so</p> <p>16 they're not subject to any damage analysis, but</p> <p>17 they're volume and quality and location to the</p> <p>18 extent that that becomes a factor, but those are</p> <p>19 independent of an anticompetitive behavior.</p> <p>20 The second way of looking at</p> <p>21 premia is to drop out volume and quality and</p> <p>22 location and identify whatever is paid to the</p> <p>23 farmer above, net of, probably the better way,</p> <p>24 of the over order premium, adjusted for the</p>

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1 specific farmer's butter fat, and location and
 2 so forth. In some cases that could be negative
 3 and in some cases that could be positive.
 4 Q. As you understand what you call
 5 the cap between Dean and DMS, to which of those
 6 definitions of over order premium, if either,
 7 did it apply?
 8 A. What I have tended to do, because
 9 it is the easiest calculation and it is the one
 10 most commonly referred to among those in the
 11 industry, is the first, gross pay, minus the
 12 Federal order price.
 13 Q. And is it a correct reading of
 14 paragraph 44 of your report that Dean and DMS
 15 agreed that that premium would be zero?
 16 A. No.
 17 Q. It would be zero or negative?
 18 A. No.
 19 Q. What is the correct reading of the
 20 cap using the definition of over order premium
 21 that you just articulated?
 22 A. I guess you haven't listened to
 23 me. That's fine. We can just keep at this for
 24 as long as you want.

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1 Changes do occur. And some of
 2 these changes occur on a market-wide basis and
 3 DMS and DFA, more or less at the same time,
 4 agreed that they would invoice processors for a
 5 volume premium, which I think was set at \$0.50
 6 per hundred weight.
 7 Dean agreed by its actions, I
 8 haven't seen any piece of paper to that effect,
 9 but by its actions to -- when it's invoiced for
 10 that to pay it.
 11 And from what I've seen of the
 12 payroll, data from DMS, that premium was paid,
 13 or part of it, depending on the circumstances of
 14 a particular farmer.
 15 Shortly after that initial over
 16 order premium for volume was instituted there
 17 was a quality premium or it may have been the
 18 other way around, quality first and then volume.
 19 It also was set at \$0.50 per hundred weight.
 20 Both DMS and DFA and with the cap the price paid
 21 or invoice from DMS on behalf of the
 22 independents, so-called independents, that were
 23 now supplying milk to DMS or to Dean through
 24 DMS, DMS invoiced the processing facilities to

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1 whom it was responsible for that particular over
 2 premium and it appears, though I haven't -- have
 3 not been confirmed, have not yet been able to
 4 confirm it because of data that were not
 5 available at the time of my report, that Dean
 6 paid most, if not all, of that premium, as well.
 7 So with the cap in place there
 8 were premium -- over order premiums introduced
 9 into the market at large by DMS and DFA, which
 10 were invoiced to Dean and which Dean apparently
 11 agreed to pay.
 12 Q. And have you investigated whether
 13 the DMS shippers, the farmers, received some or
 14 all of those premiums?
 15 A. If you look -- the answer is, yes,
 16 and it's evident throughout my report. There
 17 are probably nine or ten different graphs in the
 18 appendix. There are several payroll invoices
 19 that go to the farmer that identify that.
 20 Q. What was the significance, in
 21 light of that last answer, of the cap that you
 22 describe in paragraph 44? What did it do?
 23 A. It set a cap on all prices that
 24 Dean paid for its milk, other than the

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1 premium -- premia that DMS said it was going to
 2 charge and invoice to Dean and apparently Dean
 3 agreed to pay.
 4 Q. It set a cap on other elements of
 5 the price other than the premium? Did I hear
 6 that right?
 7 A. What I said in the report.
 8 MR. KUNEY: Let's mark this just
 9 for the heck of it. What is it, 408?
 10 (Defendant's Exhibit Number 408
 11 was marked for identification.)
 12 BY MR. KUNEY:
 13 Q. I've had the reporter mark as
 14 Defendant's Exhibit 408 a document that begins
 15 with the Bates number DMS 01-0018095 through
 16 18109, and it's a cover letter dated
 17 September 24th, 2003, and an attached document
 18 entitled, Outsourcing Agreement?
 19 MR. BROOKHISER: This is a letter
 20 to the State of California?
 21 MR. KUNEY: Yes, from Michelle
 22 Goolsby.
 23 BY MR. KUNEY:
 24 Q. Dr. Beyer, is this a document that

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<p>1 you've looked at in connection with your work in 2 this case?</p> <p>3 A. I'm not sure that I've seen this 4 particular document. The one that I have seen 5 is noted on page 24 in footnote 63.</p> <p>6 Q. So the -- you have seen a version 7 of an outsourcing agreement, you can't tell us 8 whether it is the exact same version as we have 9 here?</p> <p>10 A. From memory, I don't.</p> <p>11 Q. Okay. And I take it you have not 12 seen the cover letter?</p> <p>13 A. I have not seen this cover letter, 14 no.</p> <p>15 Q. Take a look if you would at the 16 middle of the first paragraph?</p> <p>17 A. Of the cover letter?</p> <p>18 Q. Of the cover letter, where 19 Michelle Goolsby writes, I guess about the third 20 sentence in, "I have attached the final 21 agreement which contains additional language in 22 Section 4(c) to address your concerns. As you 23 will see we have made clear the purpose and 24 rationale for the rebate and clearly stated that</p>	<p>1 right.</p> <p>2 MR. KUNEY: I didn't make that up.</p> <p>3 THE WITNESS: And the question 4 again, just so I --</p> <p>5 BY MR. KUNEY:</p> <p>6 Q. The question, I'll take a risk of 7 trying to make it clearer.</p> <p>8 The language that you quote in 9 paragraph 44 talks about, in no event shall the 10 price exceed the applicable regulated minimum 11 price. And the cover letter says the rebate 12 will not result in the payment of prices less 13 than the minimum price. And my question to you 14 is if those seem to you to be consistent?</p> <p>15 A. We're going back to what we talked 16 about before. Less than or more than.</p> <p>17 Q. Right?</p> <p>18 A. I can intuit, I don't know if my 19 intuition is correct, but that California was 20 concerned about a sum of money that Dean would 21 pay to DMS, which is identified, I think, in 22 this particular agreement, \$4.5 million. And, 23 therefore, wanting to be assured that farmers 24 would still, notwithstanding this rebate, from</p>
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<p>1 the rebate will not result in payment of prices 2 less than the minimum price requirements." Do 3 you see that?</p> <p>4 A. Yes, I do.</p> <p>5 Q. Is that -- is that cover letter 6 inconsistent with your understanding of the 7 provision in the agreement between Dean and DMS 8 that relates to the minimum price requirements 9 of any jurisdiction?</p> <p>10 MR. BROOKHISER: Could you read 11 that question back, please?</p> <p>12 (The record was read as 13 requested.)</p> <p>14 MR. BROOKHISER: I'm going to 15 object because I don't know what you mean by 16 minimum price requirements of any jurisdiction.</p> <p>17 MR. KUNEY: It's the language in 18 the -- it's quoted in his report.</p> <p>19 MR. BROOKHISER: Minimum price 20 requirements --</p> <p>21 MR. KUNEY: Minimum price 22 requirements of any jurisdiction is the language 23 quoted in his report, quoted from the agreement.</p> <p>24 MR. BROOKHISER: Oh, okay. All</p>	<p>1 Dean to DMS would be paid the minimum -- at 2 least the minimum price, not less than.</p> <p>3 The cap is DMS and Dean agreeing 4 that they would not pay more than the Federal 5 minimum. There's -- there's a vast difference 6 between those two.</p> <p>7 Q. Is it price fixing in any sense 8 that you as an economist use that term if Dean 9 and DMS agree on the price that Dean will pay 10 DMS for milk?</p> <p>11 A. It depends. And why does it 12 depend? It depends on who the other 13 participants in the marketplace are and whether 14 those participants collectively have market 15 power.</p> <p>16 There are millions of contracts 17 determined day in and day out among purchasers 18 of goods, sellers of goods, and the recipient 19 parties in terms of quantities -- terms and 20 conditions, including prices.</p> <p>21 Those contracts do not necessarily 22 imply anything approaching price fixing, but 23 there can be an agreement on prices in a 24 marketplace if there are other parties involved</p>

<p style="text-align: right;">Page 162</p> <p>1 and if those parties collectively have market 2 power. 3 Q. Who else was involved, as you 4 understand it, in the agreement between Dean and 5 DMS that we've been talking about for the last 6 few minutes? 7 A. If you mean the parties who sat 8 down and initialled the agreement, just Dean and 9 DMS. However, that is not consistent with the 10 total set of information about this marketplace. 11 DFA controlled DMS. DFA – DMS was a creation 12 of DFA. 13 Dean and DFA had a history that 14 made the new Dean – that made the merger with 15 Suiza feasible. And if DFA had not acted with 16 NDH that merger would not have proceeded. There 17 may have been other circumstances, but DFA made 18 it happen. So that when one looks at the 19 connection, the intersection of these entities 20 in the Southeast it is a collective market power 21 in their – in my judgment as alleged by the 22 Plaintiff, their collective ability to establish 23 prices. 24 You can call it price fixing.</p>	<p style="text-align: right;">Page 164</p> <p>1 profit, its surplus, however defined would be 2 better, larger with this joint behavior than 3 without it. Joint behavior becomes possible 4 only when the participants collectively have 5 market power. 6 Q. I asked you earlier whether it was 7 your understanding that the Plaintiffs were 8 alleging that the processor Defendants 9 communicated and expressly agreed about the 10 price they were going to pay for milk. 11 I didn't at that point, but I now 12 want to ask, is it your understanding that the 13 Plaintiffs are alleging that the processor 14 Defendants and DFA all communicated and agreed 15 upon the price at which processors would buy 16 milk? 17 MR. BROOKHISER: Can you read that 18 back, please? 19 (The record was read as 20 requested.) 21 THE WITNESS: I don't recall 22 specifically whether that is an allegation, 23 though the overall thrust of the Complaint is 24 that the Defendants collectively established</p>
<p style="text-align: right;">Page 163</p> <p>1 Economists don't use that term. It is an 2 agreement, coordination, joint behavior on 3 prices that would not occur if these entities 4 had all been acting independently. 5 Q. Is it -- is DFA's enabling, to use 6 your word, the Suiza/Dean merger to go through, 7 as you understand it, part of the alleged 8 anticompetitive conduct in this case? 9 A. Whether that conduct is standing 10 by itself is anticompetitive to me as an 11 economist is unimportant. 12 What is important that merger with 13 DFA involvement establishes part of, an 14 important part of, the market power, monopsony 15 or monopoly, which the Defendants collectively 16 have. 17 Q. And as you understand it why 18 was -- what was DFA's motivation to enable the 19 creation of this monopsony power in the 20 marketplace? 21 A. I don't know, specifically, but I 22 can surmise as an economist who has looked at 23 other monopsonies and monopolies that DFA 24 considered as its profit maximization, its</p>	<p style="text-align: right;">Page 165</p> <p>1 prices, coordinated their establishment, and in 2 reality when one looks at the various mechanisms 3 for pricing between processors and farmers it is 4 readily apparent to me as an economist that all 5 the preconditions are in place, that even if 6 they didn't sit down in a room and say, you're 7 going to pay this, I'm going to pay that, the 8 processors were assured that the price of raw 9 milk that they paid would -- let me put it in 10 the negative, would not put them at a 11 competitive disadvantage in the marketplace. 12 BY MR. KUNEY: 13 Q. I appreciate that as an economist 14 it may not make a difference -- 15 A. What? 16 Q. I think -- I just wanted to be 17 clear. Did I hear you say that you didn't 18 remember whether there was -- that there was 19 communication and an express agreement about the 20 price at which processors would purchase milk? 21 A. I don't recall. 22 Q. Okay. And just to save us a 23 little pain, I take it the answer would be the 24 same if I changed the question and said SMA</p>

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<p>1 instead of DFA in terms of there being 2 communications and an express agreement about 3 the price at which processors would buy milk? 4 MR. BROOKHISER: And your question 5 is, is that specifically mentioned? 6 BY MR. KUNEY: 7 Q. Is that an allegation in this 8 case? 9 A. What do you mean by express 10 agreement? 11 Q. That people have communications in 12 the case of an express agreement about price. 13 They have communications about price as a result 14 of which they both -- one or more people are 15 committed to charging a common price or paying a 16 common price, depending on buyers or sellers? 17 A. Again, I don't know for a fact 18 whether it's in the Complaint, but the 19 allegation -- overarching allegation in the 20 Complaint is the conduct is joint, it is 21 coordinated and results among other things in a 22 lower price paid to the farmers than would have 23 been paid. 24 Q. Let's go back to paragraph 22 of</p>	<p>1 hypothetically the entire United States and the 2 people who are working with him in support of 3 his case which would be allegations very similar 4 to the Complaint would use the same set of data 5 and information as would the Class of all 6 farmers in Southeast. That's all that I'm 7 saying. 8 Q. I see. If the relevant market, 9 when someone finally decides what it is, would 10 turn out to be a variety of metropolitan areas 11 and not so metropolitan areas throughout the 12 Southeast, in other words, some were to conclude 13 that there were 32 relevant markets in the 14 Southeast then your opinion that you're offering 15 today is that there would be common proof within 16 each of those 32 relevant markets? 17 A. If it turned out that way, yes. 18 Q. Not necessarily the 32, but within 19 whatever the market turns out to be? 20 A. That's correct. 21 Q. And that's all you're saying; 22 right? 23 A. That and I've identified a 24 preliminary opinion based almost entirely off of</p>
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<p>1 your report. It looks like it's on page 12. 2 Dr. Beyer, am I -- are you opining 3 today that the market for purposes of evaluating 4 the challenged conduct here is the states that 5 are comprised of Federal Orders 5 and 7? 6 A. No. 7 Q. Okay. What is the market? 8 A. Let me correct you. 9 I am not giving an opinion as to 10 what the market is. That will be done at a 11 subsequent stage of analysis. 12 What I am opining about is that 13 the common proof of that relevant product 14 market, geographic market, whatever it may be, 15 has to be done with the same set of information 16 whether it be for an individual farmer who 17 brings the same set of complaints for the Class 18 as a whole. 19 Q. Common proof across the scope of 20 whatever the market turns out to be, is that 21 what you mean? 22 A. For defining the market. 23 So an individual farmer, if the 24 farmer says the relevant geographic market is</p>	<p>1 positions taken by Defendants themselves in 2 prior official matters and by examining the data 3 for the production and sale of milk. 4 Q. What data have you examined with 5 respect to the question of whether the area 6 covered by Federal Order 6 should be considered 7 part of the relevant market in this case? 8 A. Well, to begin with I don't have 9 data on market Order 6, other than if you make 10 certain assumptions other than about Order 6 and 11 the state of Florida being one in the same, and 12 I've looked at total population. I've looked at 13 the members who -- the farmers who are members 14 of cooperatives in Florida, principally SML, but 15 also DFA to the extent they -- DFA has provided 16 location data, but almost all of the data that 17 has been provided to me and to Nathan 18 Associates, to the Plaintiffs, has been for 19 Orders 5 and 7, which is the Southeast. 20 Q. Is the -- is one of the important 21 considerations in defining the relevant market 22 the area within which a customer looks to 23 purchase whatever the product is that we're 24 talking about?</p>

<p style="text-align: right;">Page 170</p> <p>1 A. That could be one consideration. 2 Q. Is that a consideration that you 3 would anticipate being part of the consideration 4 in this case to decide what the relevant market 5 is? 6 A. Yes. 7 Q. And when you talk about consumers 8 looking to purchase the product I take it that 9 will include consumers looking outside the 10 boundaries of Orders 5 and 7 to purchase milk on 11 those occasions when they do so? 12 A. That is correct, although we do 13 have data on that and thus far it appears 14 that -- which is reflected in my report, the 15 exports as a percent of the total production 16 from Orders 5 and 7 is very small. 17 Q. How much of the milk produced in 18 Orders 5 or 7 ends up getting sold outside? 19 A. According to the data that we have 20 received, about 5 percent. 21 Q. And given that you've said more 22 than once that the Southeast is a deficit region 23 are you surprised in any way that the flow of 24 exports from Orders 5 and 7 is relatively small?</p>	<p style="text-align: right;">Page 172</p> <p>1 Q. Are you now saying that PLOCAL, as 2 used in your first methodology is not the actual 3 prices paid to acquire local milk in your first 4 methodology? 5 A. I never said it. You may have 6 understood it to be, but I don't know how many 7 times I said this, we're comparing the cost of 8 acquisition under two different sets of 9 circumstances and it is the difference, if any, 10 in those two costs of acquisition that represent 11 through this first methodology a measure of 12 damages. 13 Q. What is the significance, if any, 14 to you for market definition purposes of the 15 fact that roughly 6 percent of the milk produced 16 in Orders 5 and 7 that is controlled by DFA and 17 Dairy Marketing Services flowed between those 18 two Orders? This is in bottom of 13, top of 14 19 of your report. What's the significance of 20 that? 21 A. It's just reporting the facts. 22 Those are -- it is a relatively small movement, 23 but it nonetheless occurs. 24 Q. It's about the same -- roughly the</p>
<p style="text-align: right;">Page 171</p> <p>1 A. The data are what the data are. 2 I'm not surprised one way or the other. 3 Q. You said in -- much earlier today 4 that one of the methods that you might use to 5 evaluate pricing here is to compare local prices 6 to the cost of acquisition of milk outside the 7 combined reach of Orders 5 and 7. Do you 8 remember our discussion about that? 9 A. That's not what I said. 10 The method we talked about at 11 considerable length, right at the beginning of 12 the deposition, is comparing the cost of 13 acquisition that actually occurred of imports 14 into the Southeast, versus the cost of 15 acquisition of those same imports that would 16 occur in a but-for environment. It's not 17 comparing imports with prices in the Southeast. 18 It's comparing the cost of acquisition under two 19 sets of circumstances, as imports were actually 20 acquired with the allegations of joint behavior 21 and anticompetitive conduct and in a 22 circumstance where there is not joint behavior 23 in a competitive -- anticompetitive behavior 24 alleged.</p>	<p style="text-align: right;">Page 173</p> <p>1 same magnitude as the export of milk from Orders 2 5 and 7 to Order 6, 5 percent, 6 percent? 3 MR. BROOKHISER: I think that 4 mischaracterizes his testimony. 5 THE WITNESS: Let me put it in my 6 words. 7 The exports from the Southeast, 8 Orders 5 and 7, is about 6 percent of total 9 output in the Southeast. 10 And the Grade A raw milk that is 11 marketed in one or the other of these two -- is 12 produced in one or the other of these two Orders 13 is shipped to the other order, so there is 5 or 14 6 percent of the total output of the Southeast 15 that is intra Southeast movement. 16 BY MR. KUNEY: 17 Q. Intro or intra? 18 A. Well, better -- let's be explicit. 19 Between Order 5 and 7. 20 Q. Have you examined the question of 21 the area within which a particular dairy farmer 22 in the Southeast looks to market his or her 23 milk? 24 A. I have not done so in a systematic</p>

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<p>1 way.</p> <p>2 Q. Have you done so in a not so</p> <p>3 systematic way?</p> <p>4 A. Reading depositions, for example,</p> <p>5 and this question is often asked, even of</p> <p>6 nondairy farmers, for example, the maximum</p> <p>7 distance that Grade A raw milk can be shipped,</p> <p>8 et cetera, et cetera.</p> <p>9 So there is anecdotal information</p> <p>10 provided in deposition testimony and</p> <p>11 occasionally in some of the documents.</p> <p>12 To reach the conclusions</p> <p>13 concerning common impact and damage</p> <p>14 methodologies it has not been necessary for me</p> <p>15 to look at individual farmers and their</p> <p>16 relationship of where they sell that milk to</p> <p>17 specific processors, if they know.</p> <p>18 Q. Based upon the work you've done in</p> <p>19 the case so far do you have a view of about how</p> <p>20 far, in terms of miles, farmers in the Southeast</p> <p>21 ship their milk?</p> <p>22 A. I don't.</p> <p>23 An average, weighted average can</p> <p>24 be computed. I haven't computed it.</p>	<p>1 data that are used, which may include the farmer</p> <p>2 which we have for the most part, not entirely,</p> <p>3 but for the most part, already at our disposal,</p> <p>4 and therefore it is the sum total of all of the</p> <p>5 farmers in the Southeast and the processors in</p> <p>6 the Southeast that I've looked to.</p> <p>7 Q. Have you -- do you believe one</p> <p>8 needs to consider an aggregate or average</p> <p>9 measure of how far farmers can economically ship</p> <p>10 their milk in determining their relevant market?</p> <p>11 A. No, I don't think that's necessary</p> <p>12 because I consider farmers as with firms to be</p> <p>13 profit maximizers and they're not going to be</p> <p>14 producing milk that costs them a lot of money to</p> <p>15 find a home to process. And, therefore, what</p> <p>16 the actions of several thousand farmers are</p> <p>17 tells me as an economist much more than this</p> <p>18 particular statistic.</p> <p>19 Q. And how do you -- how would you</p> <p>20 envision one would arrive at a conclusion that</p> <p>21 dairy farmers in Arkansas are in the same</p> <p>22 relevant market as dairy farmers in North</p> <p>23 Carolina?</p> <p>24 A. If you consider that an important</p>
Page 175	Page 177
<p>1 Q. Uh-huh. Have you investigated the</p> <p>2 question of whether the size of a dairy farm has</p> <p>3 any relationship to how far dairy farmers ship</p> <p>4 their milk?</p> <p>5 A. If I were an agriculture economist</p> <p>6 and looking for a subject to write on I might do</p> <p>7 that empirical analysis but-for, again, the</p> <p>8 opinions that I've offered in terms of common</p> <p>9 impact and damage methodology is not necessary.</p> <p>10 Q. Does the determination of the</p> <p>11 relevant market in your view depend in any way</p> <p>12 on the issue of how far a farmer can ship his</p> <p>13 milk?</p> <p>14 A. You're talking about geographic</p> <p>15 market here?</p> <p>16 Q. Uh-huh. Yes, I am?</p> <p>17 A. Not the product market.</p> <p>18 Q. Geographic market?</p> <p>19 A. What happens -- what the</p> <p>20 circumstances are for a particular farmer is</p> <p>21 immaterial to defining a relevant geographic</p> <p>22 market.</p> <p>23 A relevant geographic market is</p> <p>24 determined by what is reflected in the set of</p>	<p>1 question then I would say to you, you perform</p> <p>2 that analysis. I don't consider it necessary.</p> <p>3 What I've done also at this stage</p> <p>4 of the preliminary basis is to look at the</p> <p>5 postulation that the relevant geographic</p> <p>6 market -- postulation by Mr. Holland and</p> <p>7 Mr. Sims, who are -- who did work for various</p> <p>8 Defendants in public hearings describe what the</p> <p>9 relevant geographic market should be and tested</p> <p>10 the hypothesis to the extent data are available</p> <p>11 and it's described in my report, and it</p> <p>12 confirmed that.</p> <p>13 I'm not asking the question, will</p> <p>14 a small group of farmers in one location be in a</p> <p>15 different -- constitute a different geographic</p> <p>16 market. It is the behavior of all farmers in</p> <p>17 this market that defines what the relevant</p> <p>18 geographic market is.</p> <p>19 MR. KUNEY: Could I hear the first</p> <p>20 three sentences of that read back, please?</p> <p>21 (The record was read as</p> <p>22 requested.)</p> <p>23 MR. KUNEY: Great. Thank you.</p> <p>24 Thank you.</p>

<p style="text-align: right;">Page 178</p> <p>1 BY MR. KUNEY:</p> <p>2 Q. Dr. Beyer, in your view do hauling</p> <p>3 costs have any effect on the scope of the</p> <p>4 geographic market for purposes of this case?</p> <p>5 A. They could and hauling costs in</p> <p>6 the end will be determined by the flow of</p> <p>7 milk -- assuming no structural impediments,</p> <p>8 which is part of the allegations of the</p> <p>9 Plaintiffs, but the distance that the milk can</p> <p>10 economically be moved will, of course, determine</p> <p>11 what the behavior of farmers and processors will</p> <p>12 be.</p> <p>13 Q. Has there been any change over</p> <p>14 time as you understand it in the distance that</p> <p>15 milk can be economically moved?</p> <p>16 MR. BROOKHISER: I object. That's</p> <p>17 over broad.</p> <p>18 MR. KUNEY: I'll take that as a</p> <p>19 form objection. It's fine.</p> <p>20 THE WITNESS: There has.</p> <p>21 Technology in transportation, not</p> <p>22 only about milk but in a variety of different</p> <p>23 perishable commodities has improved over time in</p> <p>24 a variety of ways.</p>	<p style="text-align: right;">Page 180</p> <p>1 distinct from farm to processing facility, may</p> <p>2 be greater than the local comparison and,</p> <p>3 therefore, requiring some additional</p> <p>4 transportation subsidy?</p> <p>5 Q. Do you have an understanding as to</p> <p>6 why the market administrators don't expect that</p> <p>7 the forces of supply and demand will take care</p> <p>8 of ensuring that milk travels the distance</p> <p>9 that's needed?</p> <p>10 A. I have not examined the rationale</p> <p>11 for that. I'm just taking that as a given.</p> <p>12 Q. Do you -- do you have an</p> <p>13 understanding that over the past several decades</p> <p>14 milk production in the Southeast has been</p> <p>15 declining?</p> <p>16 A. I don't know about several</p> <p>17 decades. I do know about the period from at</p> <p>18 least 2000 to 2007 or maybe late 1990s to 2007.</p> <p>19 And over that period milk production has been</p> <p>20 declining.</p> <p>21 Q. And is it your understanding that</p> <p>22 before what for purposes of this case we called</p> <p>23 a Class period, milk production in the Southeast</p> <p>24 was declining?</p>
<p style="text-align: right;">Page 179</p> <p>1 BY MR. KUNEY:</p> <p>2 Q. And have these technology changes</p> <p>3 led to increases in the distance that milk can</p> <p>4 be economically moved?</p> <p>5 A. Yes.</p> <p>6 Q. And that's raw milk? I want to</p> <p>7 make sure we're talking about raw milk and not</p> <p>8 processed milk?</p> <p>9 A. Grade A raw milk.</p> <p>10 Q. Does the Federal Regulatory</p> <p>11 System, as you understand it for milk, provide</p> <p>12 any incentives for people to move milk from one</p> <p>13 Federal order to another?</p> <p>14 A. There are specified hauling rates</p> <p>15 and those may fall into your use of the term,</p> <p>16 incentives.</p> <p>17 Q. What is your understanding as to</p> <p>18 why the Federal Regulatory System gives hauling</p> <p>19 credits for people that move milk from one</p> <p>20 Federal order to another?</p> <p>21 A. The reason that the hauling rates</p> <p>22 are different or may be different, it's not</p> <p>23 always the case, but may be different is because</p> <p>24 of a recognition that the distances traveled, as</p>	<p style="text-align: right;">Page 181</p> <p>1 A. Based on what I've read, not</p> <p>2 actual data, but what I've read, that would</p> <p>3 appear to be the case, yes.</p> <p>4 Q. Is it also your understanding that</p> <p>5 the number of dairy farmers in the Southeast was</p> <p>6 declining in the years before what we call the</p> <p>7 Class period?</p> <p>8 A. It would appear that the number of</p> <p>9 dairy farmers which is the principal explanation</p> <p>10 of decline in production in the Southeast has</p> <p>11 been -- has undergone what I would call a</p> <p>12 long-term secular decline.</p> <p>13 Q. And what has been the long-term</p> <p>14 secular trend as you understand it in the</p> <p>15 average size of dairy farms that continue to</p> <p>16 operate in the Southeast?</p> <p>17 A. Again, I haven't looked at this</p> <p>18 systematically, but from what I've read in this</p> <p>19 case and others, the size of farms have tended</p> <p>20 to increase in terms of the number of milkable</p> <p>21 cows that are being milked on a daily basis.</p> <p>22 Q. And you clarified that increase</p> <p>23 meaning cows, not acreage?</p> <p>24 A. That's correct.</p>

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<p>1 Q. What's your understanding, 2 Dr. Beyer, as to why in the period before, 3 what's here called the Class period, production 4 and the number of dairy farmers in the Southeast 5 were declining?</p> <p>6 A. I have certain observations. I 7 need to say at the outset, this is not part of 8 my charge of responsibility.</p> <p>9 The price received for milk, in my 10 judgment, clearly has been a factor.</p> <p>11 As an economist to look at rising 12 demand long-term and declining production 13 long-term and no fundamental changes except late 14 in this period in price raises a fundamental 15 question, because price is the mechanism to more 16 closely aligned demand and supply. We went over 17 this before. I'm not suggesting that the 18 Southeast would become self-sufficient in milk, 19 but that the rate of decline of farms would be 20 less than it otherwise would be secularly over 21 the long-term, but other factors that have 22 accounted for the number of farms that have gone 23 out of production is that there are certain 24 economies of scale with new technology and new</p>	<p>1 a precise estimate, but I won't.</p> <p>2 Q. Directional is fine?</p> <p>3 A. It all goes back to price. If 4 price had been higher the rate of decline in 5 milk supply in the Southeast would be less than 6 it has been.</p> <p>7 Q. Have there been, as you understand 8 it, some farms in the Southeast that have 9 expanded the size of their herds in the period, 10 I think you said you looked at 2000 to 2007?</p> <p>11 A. Well, in some cases on an 12 anecdotal basis I have examined a longer time 13 based on deponents and dairy farmers experience 14 and others who are in the industry. And I've 15 read articles that have been prepared by USDA 16 and agriculture economists at Wisconsin, 17 Cornell, Florida, and elsewhere.</p> <p>18 Basically, this is true throughout 19 the United States so it is not unique to the 20 Southeast. As new technology has become 21 available for on farm use farmers have found 22 their ability to use this new technology 23 requires them to have larger operations and, 24 therefore, have made the necessary investments</p>
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<p>1 investments that dairy farmers can make, and 2 some do make, but they can only make those 3 investments if they have the scale of 4 operations. Therefore a larger farmer, all 5 other things being equal, will tend to be a more 6 efficient farmer.</p> <p>7 The cost of raw materials, feed, 8 possibly labor, although I haven't examined 9 that, have probably risen more rapidly than 10 other geographic areas of the country, but again 11 that is a preliminary observation, it is not 12 based on a systematic review of the data.</p> <p>13 Q. As you understand it are there 14 some --</p> <p>15 A. A final consideration here.</p> <p>16 Q. Finish, please?</p> <p>17 A. -- I don't want to say it's final 18 but of the observations I'm putting out here is 19 the alleged joint behavior of the Defendants.</p> <p>20 Q. And as you understand it what 21 contribution has that made to the decline in 22 milk production or the number of dairy farmers 23 in the Southeast?</p> <p>24 A. I could be facetious and give you</p>	<p>1 to enable them to use it.</p> <p>2 Q. With respect to the production of 3 raw milk can you give us just an example or two 4 of what some of these new technologies are that 5 you understand the larger farmers can and have 6 invested in?</p> <p>7 A. Mr. Robey described some of those 8 examples where he was able to invest in a 9 loading operation, loading from the milk 10 produced by his cows to a truck, to a tanker, 11 that would be stationed at his operation and 12 would substantially, according to his words, I 13 haven't seen any numbers to this effect, reduce 14 the cost of transporting milk from his farm to 15 wherever that tanker goes, to whatever 16 processor. That's an example.</p> <p>17 Q. Based on your examination of the 18 industry to date do you have a sense of how 19 changes in the size of farms in the Southeast 20 compare to changes in the size of dairy farms in 21 other parts of the country?</p> <p>22 A. Only as it is reported 23 occasionally in various publications or by 24 various participants.</p>

<p style="text-align: right;">Page 186</p> <p>1 The reports that I have received, 2 and as I recall they're somewhat 3 contradictory -- not contradictory. They're not 4 always with the same message, but by and large 5 what I've seen is that farm -- dairy farm size 6 has increased at a more rapid pace outside of 7 the Southeast, but it has also occurred within 8 the Southeast.</p> <p>9 Q. And in the material that you've 10 reviewed to date have you seen any explanations 11 for why dairy farm size has increased more 12 rapidly outside the Southeast?</p> <p>13 A. Profit. Profit.</p> <p>14 Dairy farmers -- some dairy 15 farmers -- from my experience you don't ask a 16 dairy farmer, you don't ask any farmer if he's 17 happy with his situation, because you're going 18 to get a litany of woes about everybody who is 19 taking money from his pocket, but that's just 20 part of the nature of the industry.</p> <p>21 My experience in Wisconsin with 22 some of the very new dairies -- not new farmers 23 but they've completely reinvested to enable them 24 to triple, quadruple, the size of their herd,</p>	<p style="text-align: right;">Page 188</p> <p>1 Let me just add, it's very clear 2 if you compare the reduction in supply in the 3 Southeast with the price paid to dairy farmers, 4 that hasn't happened.</p> <p>5 Q. What has not happened? What's the 6 that?</p> <p>7 A. Price going up.</p> <p>8 Q. The exit of dairy farmers in the 9 Southeast has not resulted in a price increase?</p> <p>10 A. Right.</p> <p>11 Q. Is it your opinion -- I think I 12 heard you say this, but I just want to go back 13 to it, that the alleged joint conduct in this 14 case, if it occurred, has hastened the exist of 15 dairy farmers in the Southeast?</p> <p>16 A. I would prefer to put it a 17 different way, but it's saying the same thing, 18 that but-for this alleged anticompetitive 19 conduct the price for Grade A raw milk paid to 20 dairy farmers would have been higher than it 21 was, which would have slowed down the rate of 22 exit of dairy farmers, but that's my observation 23 as an economist. Whether that's true or not is 24 immaterial to the final results.</p>
<p style="text-align: right;">Page 187</p> <p>1 using entirely their ability to utilize new 2 technology and increase their total profit.</p> <p>3 And at the same time right next 4 door to a dairy farm that I've walked through 5 that has made this kind of change there may be a 6 dairy farm, a farmer who is still milking 30, 35 7 cows and has been doing that all his life. But 8 profit is a function of reducing the costs of 9 operation and receiving a better price for the 10 milk that is produced. So the two go hand in 11 hand.</p> <p>12 Q. How, if at all, does the decision 13 by some dairy farmers to exit the business 14 affect those who continue to dairy farm?</p> <p>15 A. If we -- if one sets aside the 16 allegations in the Complaint and just looks at 17 it as an economist, firms that are exiting from 18 a business reduce the quantity of -- in the 19 first instance, the quantity of the goods 20 supplied and, therefore, in an unfettered market 21 enable the remaining suppliers to charge a 22 higher price.</p> <p>23 Whether that is, in fact, the case 24 depends on the nature of the marketplace.</p>	<p style="text-align: right;">Page 189</p> <p>1 The result is that you could have 2 a higher price and still have dairy farmers 3 exiting at the same rate because the efficiency 4 changes that are occurring would be -- would 5 offset those exits or they would be partially 6 compensated.</p> <p>7 Q. So if I understood that last 8 piece, so the farmers who didn't adopt new 9 technologies might be exiting the business even 10 if there were price increases?</p> <p>11 A. No. They might. We don't know, 12 but to me that is not -- to know what the rate 13 of farm development and change has been in the 14 Southeast and would be in a but-for environment 15 is not necessary in order to identify a but-for 16 price that farmers would have been paid for 17 Grade A raw milk.</p> <p>18 Q. And the -- even at the but-for 19 price is it your understanding that there would 20 have been some exit of farmers from the dairy 21 farming business in the Southeast?</p> <p>22 A. Yes. In my judgment. Now, 23 whether or -- there may be other agricultural 24 economists that would say that would change.</p>

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<p>1 MR. KUNEY: Let's go off the 2 record just for a moment, if we could. 3 THE VIDEOGRAPHER: Going off the 4 record. The time on the video screen is 5 15:12:19. 6 (A brief recess was taken.) 7 8 THE VIDEOGRAPHER: Going back on 9 the record. The time on the video screen is 10 15:26:30. Please continue. 11 BY MR. KUNEY: 12 Q. Dr. Beyer, I'm going to ask the 13 court reporter to mark as Defendant's 14 Exhibit 409 a -- looks like a PowerPoint 15 presentation entitled, Dairy Production in 16 Florida and Southeast Orders by Sue Mosley, 17 Market Administrator and it's dated 18 January 31st, 2008? 19 (Defendant's Exhibit Number 409 20 was marked for identification.) 21 MR. BROOKHISER: What did you say 22 this was, 409? 23 MR. KUNEY: 409, yeah. 24 MR. BROOKHISER: Can I ask, I</p>	<p>1 of milk pooled on any order and then it lists a 2 variety of states, Alabama, Arkansas, et cetera. 3 Do you see that? 4 A. Yes. 5 Q. Is that figure at least generally 6 consistent with your understanding of the 7 magnitude of the production decline in those -- 8 in that time period for states in the Southeast? 9 MR. BROOKHISER: But not including 10 Florida? 11 MR. KUNEY: Including or excluding 12 whatever his understanding might be. 13 THE WITNESS: If you look at -- I 14 might as well pull it out, I think it's 15 exhibit -- I don't have color here. This would 16 have been very pretty. 17 BY MR. KUNEY: 18 Q. If we had done it in color? Next 19 time? 20 A. What I've shown in Exhibit 14. 21 Q. Yes? 22 A. Is in effect for the Southeast, 23 Orders 5 and 7, although it is based on the 24 states because we don't have exact production by</p>
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<p>1 don't see a production number on this so I 2 assume this isn't part of a document production? 3 MR. KUNEY: No. It is not it is 4 from the website of the Southern Dairy 5 Conference. 6 BY MR. KUNEY: 7 Q. Dr. Beyer, have you seen this 8 before? 9 A. No. I have not. 10 Q. Do you know who Sue Mosley is? 11 A. I can read. 12 Q. Have you had any contact with the 13 Market Administrator's Office in connection with 14 your work on this case? 15 A. Two of my staff working for me 16 have. 17 Q. The -- of course, the pages are 18 not numbered. The third page in is entitled, 19 SE & FL Combined State Production. Do you have 20 that in front of you? 21 A. Yes. 22 Q. There is a bar graph. This shows 23 a decline in production of 24.4 percent from the 24 year 2000 to the year 2007 for the total pounds</p>	<p>1 the Orders, so there are several states where 2 only part of the states are in one or the other 3 two Orders, but you can see that -- it actually 4 goes from 1995, which is from 2000. 5 It appears to be at about the same 6 rate, but I'm just looking at these two graphs 7 very quickly. 8 Q. Okay. Take a look if you would -- 9 it will be about -- four pages farther in. It's 10 entitled, State Milk Production? 11 A. Yes. 12 Q. And there's actually two with that 13 same title. The first one I hope you have in 14 front of you has Florida, Missouri, Kentucky, 15 Georgia, Tennessee? 16 A. Yes. 17 Q. Great. You see the various 18 figures given there for the production decline 19 in those particular states? 20 A. Yes. 21 Q. Do you, based on your examination 22 of this industry to date, can you offer any 23 observations or explanations as to why the 24 decline in production in Kentucky, for example,</p>

<p style="text-align: right;">Page 194</p> <p>1 is 25 percent, whereas in Georgia it's only 2 3.2 percent? 3 A. No. In looking at it state by 4 state to me is not a very relevant economic 5 analytical task. 6 I know that's a way in which the 7 state boundaries is a way in which data are 8 kept, but it doesn't -- the state boundary is by 9 itself not very meaningful. 10 Q. Turn the page, if you would, just 11 another page, same set titles, different group 12 of states, Louisiana, Mississippi, Arkansas, and 13 Alabama, I believe it is. Do you have that one 14 in front of you? 15 A. I do. 16 Q. Do you have any observation or 17 explanation as to why the decline in production 18 in Arkansas during this time period is 19 57.2 percent? 20 A. Rather than something else? 21 Q. Rather than the numbers in all of 22 the other states that are referenced? 23 A. I do not. 24 Q. One more page in, if you would, a</p>	<p style="text-align: right;">Page 196</p> <p>1 Federal Order 7 as a source of the milk pooled 2 in Order 6 and 7 has declined between 2000 and 3 2007, consistent with information that you've 4 reviewed in your examination of this industry to 5 date? 6 A. Could I have the question read 7 back or repeat it, because I was looking at this 8 graph and it was a long question? 9 Q. It was a long question. 10 Is the decline in Federal Order 7 11 as a source of milk to these particular pool 12 plants, is that decline consistent with other 13 information that you've reviewed during your 14 work on this matter? 15 A. It is consistent with the decline 16 in production, though I've looked at the decline 17 in production for Order 7 and 5 together, not 18 just for Order 7. 19 Q. Where is Federal Order 126, if you 20 know? 21 A. Federal Order 126 is in the 22 Southwest. It is Western Texas and New Mexico. 23 Q. And what about Federal Order 33, 24 where is that?</p>
<p style="text-align: right;">Page 195</p> <p>1 chart entitled, Average Farm Size. 2 Do you have an understanding or 3 explanation as to why the average farm size in 4 Florida is significantly larger than the average 5 dairy farm size in Georgia, Alabama, Missouri, 6 Kentucky, and the other states shown on this 7 page? 8 A. I don't. 9 Q. Almost at the end -- four pages 10 from the end, there's a chart entitled, Sources 11 of Southeast and Florida Milk. Do you see that? 12 A. Yes. 13 Q. And this graph, set of graphs, 14 depicts producer milk pooled and delivered to 15 Federal Order 6 or 7 pool plants. Do you see 16 that? 17 MR. BROOKHISER: That's the 18 description at the bottom of the page? 19 MR. KUNEY: Yes. That's what I 20 said. Do you see that? 21 THE WITNESS: Okay. 22 BY MR. KUNEY: 23 Q. Dr. Beyer, is the data shown here 24 that with respect to the Southeast and Florida</p>	<p style="text-align: right;">Page 197</p> <p>1 A. Right offhand, I don't recall. 2 Q. Federal Order 32, do you know 3 where that is? 4 A. Same answer. 5 Q. Okay. Am I reading this graph 6 correctly that Federal Orders 7, 6, 126, 33, and 7 32, are larger sources of milk to the pool 8 plants being described here than Federal Order 9 5? 10 A. Yes. For Federal Order 7 and 6. 11 I mean the graph that the market administrator 12 is presenting looks at Order 7, the Southeast 13 and Florida Order 6. 14 Q. Right? 15 A. And I've not looked at those in 16 combination. I've looked at a variety of others 17 in combination, but with 5 and 7. 18 Q. Do you know why the market 19 administrator thought it useful to evaluate 20 Federal Order 6 and 7 together, rather than 5 21 and 7? 22 MR. BROOKHISER: I'll object, 23 calls for speculation. He testified he's never 24 seen this.</p>

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<p>1 THE WITNESS: No.</p> <p>2 BY MR. KUNEY:</p> <p>3 Q. Have you examined the question of</p> <p>4 whether a more appropriate relevant market would</p> <p>5 be Federal Orders 6 and 7, rather than Federal</p> <p>6 Orders 5 and 7?</p> <p>7 A. I considered it and set it aside.</p> <p>8 Q. Dr. Beyer, as you understand the</p> <p>9 marketplace in the Southeast are co-ops</p> <p>10 competing to get farmers to sign up as members?</p> <p>11 A. What do you mean by competing?</p> <p>12 Q. Are they working to get farmers to</p> <p>13 sign up with their co-op or stay signed up with</p> <p>14 their co-op rather than some other co-op?</p> <p>15 A. Sure.</p> <p>16 Q. And are they -- as you understand</p> <p>17 it on what basis or bases do co-ops in the</p> <p>18 Southeast compete to try to keep and gain farm</p> <p>19 members?</p> <p>20 A. From what I've seen by and large</p> <p>21 they do not compete on price. They compete on</p> <p>22 other intangibles such as, we're good guys, or</p> <p>23 we're more efficient at hauling, we can reduce</p> <p>24 your hauling costs if you come with us.</p>	<p>1 on, and I'm not sure that we would get the</p> <p>2 answer to that in the process of interviewing,</p> <p>3 the reality is I don't know and I don't think</p> <p>4 anybody knows why a person -- why a given farmer</p> <p>5 has gone from DMS to what is called Dean Direct.</p> <p>6 However, having said that, the</p> <p>7 number of farmers out of the 4,300 Class</p> <p>8 members, as I mentioned earlier, is very small.</p> <p>9 Q. Are you aware that SMI has some</p> <p>10 farmer members in the state of Tennessee?</p> <p>11 A. Yes.</p> <p>12 Q. And is SMI's -- are SMI's</p> <p>13 activities in Tennessee one of those isolated</p> <p>14 examples you were talking about where there was</p> <p>15 pay price competition that influenced farmers</p> <p>16 decisions about what co-op to participate in?</p> <p>17 A. Potentially, yes, limited in time</p> <p>18 and space.</p> <p>19 Q. When you say, potentially yes, are</p> <p>20 you saying you're not sure if that's an example</p> <p>21 of pay price competition?</p> <p>22 A. Yes, because I don't know the</p> <p>23 circumstances surrounding it. I only have</p> <p>24 secondhand comments by people working for DFA</p>
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<p>1 There have been some isolated</p> <p>2 examples of price competition, but they're very</p> <p>3 few and essentially price is not the mechanism</p> <p>4 by which competition occurs.</p> <p>5 Q. In the named Plaintiffs</p> <p>6 descriptions of how they have from time to time</p> <p>7 changed affiliation have they said the pay price</p> <p>8 differences was not a consideration to them?</p> <p>9 A. I don't recall any of them saying,</p> <p>10 to put it in a positive form, that changes that</p> <p>11 they made were motivated by a change in price.</p> <p>12 Several of the named Plaintiffs</p> <p>13 went to -- became DMS because they didn't like,</p> <p>14 for whatever reasons, DFA and they wanted to</p> <p>15 escape from DFA and it was only later that they</p> <p>16 learned that they hadn't really escaped from</p> <p>17 DFA, it was just in other clothing.</p> <p>18 Q. Is it your understanding that the</p> <p>19 movement of some farmers from being DMS shippers</p> <p>20 to being Dean Directs was not related to pay</p> <p>21 price issues?</p> <p>22 A. I've only seen the deposition of</p> <p>23 one such person and it -- in the absence of</p> <p>24 interviewing the other farmers as they've come</p>	<p>1 who concluded DFA didn't like SMI being in "its</p> <p>2 territory".</p> <p>3 Q. Other than your own evaluation of</p> <p>4 the pay price data what have you done to</p> <p>5 determine whether farmers consider the</p> <p>6 differences in pay prices between co-ops to be</p> <p>7 significant?</p> <p>8 A. I don't think there's any way to</p> <p>9 define that except by looking at the prices --</p> <p>10 in the aggregate except by looking at prices</p> <p>11 that are paid to DFA farmers or other DFA</p> <p>12 affiliated cooperatives like the Maryland &</p> <p>13 Virginia, affiliated in the sense that they are</p> <p>14 part of SMA and DMF prices, in effect all the</p> <p>15 prices available where we have transaction data.</p> <p>16 By transaction data, I mean prices paid to</p> <p>17 specific farmers once a month for the milk that</p> <p>18 they have provided, both the weight and the</p> <p>19 price, and by comparison of those prices which</p> <p>20 are shown in my report at various places are</p> <p>21 almost identical.</p> <p>22 Q. Have you made any effort to</p> <p>23 determine the frequency with which farmers have</p> <p>24 changed co-op affiliations because they believe</p>

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<p>1 the pay price differences between co-ops are 2 significant?</p> <p>3 A. I have not and the reason for it 4 is it is not relevant to my opinions about 5 common impact or about damage methodologies.</p> <p>6 If I were looking at -- if I were 7 charged with the responsibility of defining -- 8 of looking at and evaluating the alleged 9 anticompetitive behavior I might examine that, 10 but I have not been asked that.</p> <p>11 Q. So if I understood that, the issue 12 of whether the farmers think the pay price 13 difference are enough to warrant moving co-ops 14 is not an issue that you have had occasion to 15 look at, given your mission in the case?</p> <p>16 A. Mission?</p> <p>17 Q. Assignment, whatever you would 18 like to call it?</p> <p>19 A. Something neutral, not a 20 pejoratively labeled term. My assignments have 21 been threefold. Is common evidence for certain 22 aspects of defining relevant markets product and 23 geographic.</p> <p>24 Determining whether the Defendants</p>	<p>1 examples in Exhibit 12(c) where DFA for 2 different pay categories and SMA's blend price 3 are also shown.</p> <p>4 Q. I see. Let's start with 12(c), if 5 we could. To understand what you have here, 6 does the heading, Average Blend Price refer to 7 the mail box price to the farmers in that pay 8 group?</p> <p>9 A. Yes.</p> <p>10 Q. So blend means mail box for 11 purposes of Exhibit 12 C?</p> <p>12 A. The blend price -- no, I'm sorry. 13 The blend price is the skim and butter fat 14 price, but specific to farmers, depending on the 15 butter fat content that they have, but the 16 butter fat price and their location arrangement.</p> <p>17 Q. All right. Let me go back to my 18 question then.</p> <p>19 I understand there are charts that 20 reflect pieces of prices to farmers, blend, 21 premiums, et cetera. I was attempting to ask 22 for the identification of charts that show, 23 track, compare, the mail box price received by 24 dairy farmers in the Southeast?</p>
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<p>1 have market power.</p> <p>2 When it's done at a subsequent 3 phase of the litigation will it require analysis 4 that is common in the way I've described it to 5 the Class.</p> <p>6 The second question is has it -- 7 is there -- if the allegations are true would 8 all members of the Class, all dairy farmers be 9 affected. My answer is, yes.</p> <p>10 And then the final is, are there 11 damage methodologies which I believe that can be 12 used on a class-wide basis that I judge to be 13 feasible. I've answered to that, yes.</p> <p>14 And the specific question that you 15 just asked me in various ways about farmer 16 movement between different co-ops, between 17 different institutional arrangements is not 18 necessary to answer any one of those three 19 questions.</p> <p>20 Q. Which of the charts attached to 21 your report, if any, provide information or a 22 tracking of mail box prices to farmers?</p> <p>23 A. Exhibit 15 is one example of the 24 tracking of those prices and there are other</p>	<p>1 A. Exhibit 15 is the monthly price 2 paid by DFA. It's not the mail box price. It 3 is the gross price from which deductions for 4 hauling and advertising and the like are paid, 5 as well as for DMS.</p> <p>6 Q. Okay. So Exhibit 15 is not quite 7 mail box prices either because expenses have not 8 been deducted? I just want to make sure I 9 understood your answer?</p> <p>10 A. Yes, that's correct.</p> <p>11 Q. Okay. So I take it -- are there 12 any others? Any exhibits in your report that 13 depict actual mail box prices received by any 14 farmer or group of farmers in the Southeast?</p> <p>15 A. No. There are parts of that. The 16 over order premium that are shown through 17 probably seven or eight are taken from those 18 mail order invoices.</p> <p>19 Mail order prices can very easily, 20 from the data that we have, be computed and 21 apparent.</p> <p>22 Q. What's the relationship, if any, 23 as you understand it between over order premiums 24 and mail box prices received by farmers?</p>

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<p>1 A. Well, the answer to that question 2 is several: Mail order premium -- over order 3 premiums are included where they're relevant for 4 a particular farmer as part of the mail box 5 price. 6 So if one farmer has -- is 7 eligible for volume and quality premium but 8 another farmer is not, and they're both with 9 DMS, their mail order price will vary and that 10 will depend upon the premium. 11 Just to be clear, from my point of 12 view, the over order premium for volume and 13 quality are factors that would occur in any 14 event, with or without the alleged joint conduct 15 and, therefore, in the end are not part of the 16 damage analysis. 17 Q. What is it you've read or analyzed 18 that has led you to the conclusion that the 19 alleged anticompetitive conduct did not touch in 20 any way volume or quality premiums? 21 A. Well, that's a good question. 22 Maybe I have led -- used the judgment that leads 23 to a downward bias in the estimate of damages by 24 leaving -- by setting those -- the values</p>	<p>1 It's a question of whether the actions that they 2 take, whether the costs involved with that to 3 them is worth the benefit, which is the premium. 4 Q. Have you investigated the question 5 of why collective conduct aimed at restricting 6 output would include the payment of a volume 7 premium? 8 A. No. 9 Q. What's the -- 10 A. Excuse me. The collective action 11 may in the end not have restricted output as its 12 intent. 13 Q. What is the relationship, as you 14 understand it, between over order premiums and 15 the Federal blend price? 16 A. The over order premiums to the 17 extent that they are granted by processors, paid 18 for by processors, are a reflection of some 19 additional value per unit of milk that the 20 processor is prepared to pay to the source of 21 milk, either the cooperative or the agent for 22 the independent farmers. 23 Q. Have you seen any information 24 suggesting that there's a counter cyclical</p>
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<p>1 assigned to those premium as being not subject 2 to anticompetitive behavior. 3 However, having said that, in most 4 industries prices can vary, depending on the 5 volumes purchased or the volumes sold. Vary on 6 the quality purchased or the quality sold, and I 7 prefer rather than getting into -- if I were 8 asked to do the damage analysis getting into a 9 prolonged debate as to whether the volume premia 10 and the quality premia are or are not a function 11 of the anticompetitive behavior to simply accept 12 it at its face value for what it is. Some 13 farmers receive them because of their 14 circumstances. They are producing sufficient 15 volume to qualify for that or specifically pass 16 the test for quality and leave it at that. 17 Q. Is it your understanding that 18 farmers can change their behavior in a way that 19 will increase their ability to earn either 20 volume or quality premiums? 21 A. Some can and some can't, but 22 farmers that have an ability to qualify for one 23 or the other or both of those premia may be able 24 to change their behavior and qualify for them.</p>	<p>1 relationship between over order premiums and 2 Federal blend price, such that when Federal 3 blend prices go up over order premiums tend to 4 go down? 5 A. I've seen several statements to 6 that effect, but all the statements to that 7 effect are from participants or individuals who 8 are employed by the participants in the alleged 9 joint conduct. 10 Q. Have you seen any -- 11 A. I'm not sure that cyclical 12 relationship is bound in stone, that it's 13 somehow deemed from on high, but that's the way 14 it's supposed to be. 15 Q. Have you seen any documents of any 16 of the organizations that are involved in 17 announcing over order premiums that, in fact, 18 the rule that they're going to use links the 19 over order premium to the Federal blend price in 20 such a way that when the blend price goes up the 21 over order premium is reduced? 22 A. I don't recall such documents. 23 Q. In your opinion, Dr. Beyer, for 24 purposes of the dairy farmers in the Southeast,</p>

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<p>1 is the -- and whether and how they've been 2 impacted, is the pertinent number the over order 3 premium or the mail box price? 4 A. Neither. It is -- it's neither 5 because the mail box price will include in some 6 instances the over order premium for volume and 7 quality. And if those are likely to be in 8 effect in any event, with or without this 9 alleged conspiracy, then they should not be 10 taken into account in the price analysis of what 11 would exist in the but-for market. 12 Therefore, in my looking at it it 13 is the mail box price less those over order 14 premiums where they apply so that there is not a 15 mistaken percentage overcharge or undercharge or 16 absolute allowed for those -- what I would call 17 normal characteristics in a marketplace, time 18 and quality, but they are simply part of the 19 landscape regardless of the way in which prices 20 to the farmers are established. Market based or 21 through the collective actions of the 22 Defendants. 23 Q. I just want to make sure I heard 24 that, next to last part correctly. Is it the</p>	<p>1 was an undercharge and how much it was; is 2 that -- 3 A. For estimating the undercharge. 4 Q. For estimating the undercharge. 5 Okay. 6 For purposes of evaluating whether 7 there has been common impact on the potential 8 members of the Class is there some different 9 price that you would point to? 10 A. You can look at a variety of 11 prices if you wish because all members of the 12 Class are treated similarly, if not identical. 13 Therefore, whether a particular premium is 14 included or subtracted, I mean, they are a 15 de minimis -- as it turns out a de minimis part 16 of the payment. It doesn't matter. There is a 17 uniform price. 18 Q. So it doesn't make any difference 19 which price you look at? 20 A. Well -- if you look at gross 21 price, mail box price, mail box price less your 22 volume and quality premium or just at the over 23 order prices identified in the two ways or 24 defined in the two ways that I have looked then</p>
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<p>1 pertinent price in your view is the mail box 2 price less volume and quality premiums? 3 A. Yes. 4 Q. Okay? 5 A. For determining the undercharge. 6 The units of product produced 7 would be 100 weight of milk by any farmer. And 8 whether there are premium for volume and quality 9 paid to that farmer as a consequence will be 10 taken out of the equation. 11 Q. And that's I take it also the 12 pertinent price for purposes of your various 13 comments about prices being subject to common 14 proof, that mail box price less volume and 15 quality premiums? 16 A. Subject to common proof? 17 Q. Well? 18 A. You're mixing. I don't understand 19 that. 20 Q. Let me back up. 21 You clarified, I believe, your 22 previous answer by saying the mail box price 23 less volume and quality premiums was the 24 pertinent price for determining whether there</p>	<p>1 prices move very similarly all across. 2 Q. For purposes of determining the 3 impact on would be Class members of the 4 allegedly anticompetitive conduct which price 5 would be the most pertinent? 6 A. For actual impact? 7 Q. Yes? 8 A. Not what I'm opining about right 9 now? 10 Q. Right? 11 A. Actual impact would occur. 12 Q. For determining impact, yes? 13 A. At the following stage of the 14 litigation, if there is one. 15 It would be the same set of 16 prices, mail order price less the volume and 17 quality discounts. 18 Q. Okay. Okay. Mail box price? 19 A. Mail box price. 20 Q. Okay. Take a look if you would at 21 paragraph 40 of your report on -- starts at the 22 bottom of 22 and runs over onto 23. 23 Take a minute if you would. You 24 might just read through the paragraph. I want</p>

<p style="text-align: right;">Page 214</p> <p>1 to ask a question about a sentence toward the</p> <p>2 end, but you might want to read the whole</p> <p>3 paragraph, just to get it back in your head?</p> <p>4 A. Okay.</p> <p>5 Q. Okay. I'm looking at the sentence</p> <p>6 that is about three from the end of the</p> <p>7 paragraph. It begins, further. Further</p> <p>8 Defendants agreed. Do you see that?</p> <p>9 A. Yes, I do.</p> <p>10 Q. Okay. What -- further Defendants</p> <p>11 agreed to circumvent the DOJ's restrictions on</p> <p>12 exclusivity of supply agreements.</p> <p>13 What restrictions were you</p> <p>14 referring to?</p> <p>15 A. As I recall in the -- both in the</p> <p>16 Complaint and specifically in the DOJ press</p> <p>17 release that part of DOJ's agreement to go ahead</p> <p>18 with this merger after DFA and NDH -- NDH were</p> <p>19 to be formed is that DFA would not have</p> <p>20 exclusive supply arrangements, full supply</p> <p>21 arrangements, with any of the parties other</p> <p>22 than, of course, itself, and it did enter into</p> <p>23 such full supply agreements with certain of the</p> <p>24 parties.</p>	<p style="text-align: right;">Page 216</p> <p>1 All I'm aware of both from some</p> <p>2 documents introduced in depositions, NDH</p> <p>3 depositions and others, that DFA nonetheless</p> <p>4 had, despite this statement by DOJ, ended up</p> <p>5 having full supply agreements. In fact, NDH</p> <p>6 signed an agreement with another cooperative</p> <p>7 which it later had to say, sorry, we can't do it</p> <p>8 because we have a full supply agreement with</p> <p>9 DFA.</p> <p>10 Q. Do you have an understanding,</p> <p>11 Dr. Beyer, of how these facts as you understand</p> <p>12 them escaped the Justice Department's attention,</p> <p>13 if, in fact, they approved the transaction on</p> <p>14 the understanding that DFA would have no such</p> <p>15 agreements?</p> <p>16 MR. BROOKHISER: Objection. That</p> <p>17 assumes facts not in evidence.</p> <p>18 THE WITNESS: Well, I put it</p> <p>19 slightly different. You're assuming that the</p> <p>20 DOJ is an omnipresent omniscient institution. The</p> <p>21 reality is go to Kathleen Turner's deposition.</p> <p>22 She identified very directly an example where a</p> <p>23 supply agreement was negotiated with a new</p> <p>24 cooperative and had to be declined because of an</p>
<p style="text-align: right;">Page 215</p> <p>1 Q. And what did you say the source of</p> <p>2 that understanding was, a press release and</p> <p>3 something else?</p> <p>4 A. The Complaint.</p> <p>5 Q. And the Complaint.</p> <p>6 Okay. So your understanding is</p> <p>7 that the Justice Department approved the merger</p> <p>8 on the understanding that DFA wouldn't have any</p> <p>9 full supply agreements with anyone involved in</p> <p>10 the transaction?</p> <p>11 A. That's my understanding, except</p> <p>12 for processing plants that it owned which had</p> <p>13 been ongoing and continuing.</p> <p>14 Q. How is it as you understand it</p> <p>15 that the Defendants were able to circumvent, to</p> <p>16 use your word, these restrictions? You're aware</p> <p>17 I take it that there have been any number of DOJ</p> <p>18 investigations of not only the merger but of the</p> <p>19 industry since the merger?</p> <p>20 A. I'm aware of only two at the time</p> <p>21 of the merger and the -- what I referred to and</p> <p>22 others have referred to as the cartelization of</p> <p>23 the Southeast milk industry which occurred in</p> <p>24 2005 on the whole.</p>	<p style="text-align: right;">Page 217</p> <p>1 existing DFA full supply agreement with one of</p> <p>2 the NDH plants. I don't know how it came into</p> <p>3 being or why DOJ did not review it, that's</p> <p>4 not -- I'm not interested in that. That's not</p> <p>5 part of my charge.</p> <p>6 BY MR. KUNEY:</p> <p>7 Q. It's only part of your report?</p> <p>8 A. It's a statement of fact.</p> <p>9 Q. A statement of fact, the existence</p> <p>10 of those restrictions, are you calling that a</p> <p>11 statement of fact?</p> <p>12 A. DOJ's announcement that an</p> <p>13 imposition of no full supply agreements with DFA</p> <p>14 who was a very important participant in the</p> <p>15 processing facilities was a consideration.</p> <p>16 MR. KUNEY: I think we're going to</p> <p>17 have to go off the record. We're close to done,</p> <p>18 but unfortunately we're at the end of the tape.</p> <p>19 THE VIDEOGRAPHER: Here marks the</p> <p>20 end of videotape number three, taken in the</p> <p>21 deposition of Dr. John Beyer. Going off the</p> <p>22 record. The time on the video screen is</p> <p>23 16:08:04.</p> <p>24 (A brief recess was taken.)</p>

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<p>1 2 THE VIDEOGRAPHER: Here marks the 3 beginning of videotape number four, taken in the 4 deposition of Dr. John Beyer. Going back on the 5 record. The time on the video screen is 6 16:19:15. Please continue. 7 BY MR. KUNEY: 8 Q. Dr. Beyer, take a look if you 9 would please at page 38 of your report and in 10 particular at footnote 93? 11 A. Yes. 12 Q. Okay. You wrote there, "it is 13 clear from the exhibits that the premiums paid 14 to independent dairy farmers began to increase 15 in late 2005 and early 2006." 16 Now, you didn't mean just the 17 premiums to independent dairy farmers; did you? 18 A. No. This same footnote is 19 included in the following discussion of DFA. 20 Q. Okay. And you said, "though this 21 phenomenon requires additional research which is 22 ongoing." 23 Have you done any additional 24 research into this increase in premiums since</p>	<p>1 them, suggest to me that a responsible – 2 professionally responsible recognition is of 3 potential contributing factors. 4 How they might – all of them 5 could potentially be a factor explaining why 6 over order premiums have increased. Whether 7 they have or not remains to be determined and 8 that is something that I think an economist who 9 does this estimate – the damage estimation at a 10 subsequent stage of the analysis would need to 11 take into account. That's all it's saying. 12 Q. Is there something about either 13 Mr. Hanman or whoever replaced him as CEO of DFA 14 that would lead you to connect that transition 15 from Mr. Hanman to Mr. Smith to an increase in 16 premiums paid to dairy farmers in the Southeast? 17 A. By itself, no, but it could be a 18 factor given that Mr. Hanman was at the creation 19 of DFA and was intimately involved as CEO of DFA 20 at the time of the various institutions in the 21 Southeast that became DFA affiliated or DFA 22 controlled. 23 Q. Is it your understanding that some 24 part of the challenged conduct in this case</p>
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<p>1 you submitted your report? 2 A. No, I have not. 3 Q. Okay. You wrote, "at present my 4 understanding is that a number of factors may 5 have contributed to increased premiums during 6 this time period." 7 I would just like to walk through 8 them with you and have you explain what it is 9 you understand to be the connection, if any, 10 between the factor you listed and this increase 11 in premiums, okay. 12 So if we could, let's begin with 13 the retirement of DFA CEO Defendant Gary Hanman. 14 What is your present understanding as to how 15 Mr. Hanman's retirement may have contributed to 16 increased premiums in late 2005 and early 2006? 17 A. Let me say, and this is a way of 18 dealing with all of these, I think there are 19 four factors that are listed here, that there is 20 a convergence of these factors at about the same 21 time. It's a fairly long period, but from 2004 22 through early 2007, and given their occurring 23 along with the rise in over order premiums, 24 however defined, the two ways that I've defined</p>	<p>1 ended with Mr. Hanman's retirement from DFA? 2 A. It is a possibility. 3 Q. I see. It's a possibility. You 4 don't have an opinion one way or another on 5 that? 6 A. No, I don't. 7 Q. What is it about the change in 8 SMA's supplemental milk purchase agreements that 9 might have contributed to increased premiums for 10 dairy farmers in the Southeast? 11 A. Two things happened at about the 12 same time. They may not be linked or they may 13 be linked and that's what this is about. 14 One is that there was a lot of 15 noise on the part of farmers and various 16 institutions saying in effect SMA – two things: 17 Our prices haven't changed, number one. And 18 there is too much. These are farmers, and 19 nobody quantifying what that means, too much 20 milk being brought in from the Southwest and we 21 the farmers are in effect having to pay for that 22 milk. And more or less at the same time SMA 23 begins to have what I judge to be a fairly 24 dramatic reduction in the amount of milk from</p>

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<p>1 the Southwest. I forget the exact quantities, 2 but it's like in half.</p> <p>3 That -- the reduction of those 4 imports may explain part of the rise in the over 5 order premium and, therefore, this -- if that is 6 the case, the reduction in the amount of imports 7 from the Southwest may -- which undertaken 8 separately may be a reaction, a reflection of 9 concerns on the part of dairy farmers in the 10 Southeast.</p> <p>11 Q. So am I understanding correctly 12 that the change by SMA may be in response to the 13 dairy farmer complaints and the change by SMA 14 may help explain the rise in premiums?</p> <p>15 A. Yes.</p> <p>16 Q. Is it your -- is it your view that 17 the change in SMA's supplemental milk purchase 18 agreements was part of the collaborative conduct 19 that's being challenged in this case?</p> <p>20 A. I haven't asked the question of 21 myself whether that reduction is part of the 22 challenged conduct. We'll see later as in terms 23 of the damage analysis and the work that is -- 24 the analysis through discovery that is finally</p>	<p>1 looking at the question of whether premiums to 2 dairy farmers in the Southeast were too low?</p> <p>3 A. There were -- my understanding 4 from reading some of the depositions at the time 5 that were taken by DOJ attorneys is that they 6 were probing what I have defined as over order 7 premiums, but they were probing much further 8 than just over order premiums. They were 9 looking at the cartel as they saw it and 10 attempting to define whether further 11 investigation by DOJ into this matter would be 12 warranted.</p> <p>13 Q. Do you have an understanding as to 14 whether the DOJ investigation was evaluating in 15 part whether prices were higher in the dairy 16 industry in the Southeast than would otherwise 17 have been the case?</p> <p>18 A. If they were investigating that it 19 sure didn't come through in any of the 20 depositions.</p> <p>21 Q. The last factor you reference in 22 your footnote is the present litigation; 23 correct?</p> <p>24 A. Yes.</p>
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<p>1 done by the Plaintiffs' attorneys and by 2 economists, if any, as to whether any continued 3 imports or even a much smaller level of imports 4 from the Southwest would have resulted in a 5 lower price than actually prevailed.</p> <p>6 Q. What's the connection that 7 you're -- what's the possible connection between 8 the beginning of a DOJ in investigation and the 9 increased premiums paid to dairy farmers in the 10 Southeast in late '05, early '06?</p> <p>11 A. From -- it's not always the case, 12 but from the combination of my experience and 13 the experience of other economists who have 14 written about DOJ investigations into particular 15 industries there can be a price reaction by the 16 participants as a result of the DOJ 17 intervention. It doesn't always happen, it may.</p> <p>18 Hypothesizing that this price 19 increase in premiums may reflect in part a DOJ 20 intervention in the industry in raising the 21 question has there been a cartel operating in 22 this industry, one needs to take a look at that.</p> <p>23 Q. Is it your understanding that 24 the -- a part of the DOJ's investigation was</p>	<p>1 Q. The -- do you recall when this 2 case was filed, Dr. Beyer?</p> <p>3 A. In the summer of 2007.</p> <p>4 Q. And are you suggesting in your 5 footnote that the filing of this litigation in 6 the summer of 2007 could help explain why 7 premiums went up in late 2005 and early 2006?</p> <p>8 A. Did I say that? No. I said it is 9 a factor that would be taken into 10 consideration -- could be taken into 11 consideration.</p> <p>12 Q. You say a number?</p> <p>13 A. May I finish?</p> <p>14 Q. Sure?</p> <p>15 A. Assuming that the first 16 information to the participants, the Defendants 17 and co-conspirators of such an action was when 18 it was filed, unlikely, but assuming that it 19 was, then it would really be the reinforcement 20 of potentially of the filing of this action in 21 the latter part -- the latter half of 2007.</p> <p>22 Q. I see. Have premiums stayed at a 23 higher level since early 2006 through mid 2007?</p> <p>24 A. I'll have to -- there was a period</p>

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<p>1 in which they fell and then rose again.</p> <p>2 Q. So if I'm understanding the tail</p> <p>3 end of your footnote, the present litigation may</p> <p>4 have contributed to premiums staying higher, may</p> <p>5 have, in the period after they initially rose?</p> <p>6 A. Then they -- well, there are a</p> <p>7 couple of possibilities.</p> <p>8 One is, and this is why I raise it</p> <p>9 as a potential factor. One is that the behavior</p> <p>10 of the Defendants may have changed so that the</p> <p>11 over order premiums, in fact, paid are higher</p> <p>12 than they would be in the absence, and this --</p> <p>13 the filing of this litigation may have caused</p> <p>14 the pricing of over order premiums to be higher</p> <p>15 or to increase in the latter part of 2007,</p> <p>16 though they initially fell.</p> <p>17 Q. But just to be simple minded,</p> <p>18 you're not suggesting that some advanced</p> <p>19 knowledge of the present litigation went all the</p> <p>20 way back to late '05 and '06 and helped explain</p> <p>21 why premiums went up at that time?</p> <p>22 A. I am not.</p> <p>23 Q. What -- what economic factors have</p> <p>24 you looked at thus far that could explain the</p>	<p>1 analysis where the relative contribution of them</p> <p>2 both can be reflected quantitatively and their</p> <p>3 impact on price.</p> <p>4 Q. Has the -- bear with me.</p> <p>5 Have you looked at the question of</p> <p>6 whether the mail box price, less volume and</p> <p>7 quality premiums increased in late 2005 and</p> <p>8 early 2006?</p> <p>9 A. Only to the extent that I</p> <p>10 calculated over order premiums in two different</p> <p>11 ways. One of them excluding the volume and</p> <p>12 quality premium, but I have not calculated</p> <p>13 prices specifically on that basis.</p> <p>14 Q. Okay. Okay.</p> <p>15 I think that's all the questions I</p> <p>16 have so thank you, Dr. Beyer, I appreciate it.</p> <p>17 Anybody else? It sounds like that's all the</p> <p>18 questions we have?</p> <p>19 MR. BROOKHISER: I've got three or</p> <p>20 four hours -- no. Okay.</p> <p>21 MR. KUNEY: Ready to go off the</p> <p>22 record.</p> <p>23 THE VIDEOGRAPHER: Thank you,</p> <p>24 gentlemen. Here marks the end of videotape</p>
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<p>1 increase in premiums in late '05 and early '06?</p> <p>2 A. Again, I haven't looked at these</p> <p>3 in a systematic way as I would, for example, in</p> <p>4 a regression analysis. I have looked at the</p> <p>5 rate of change in demand in the Southeast, the</p> <p>6 rate of change in supply in the Southeast.</p> <p>7 Those are the two principal factors that I have</p> <p>8 examined and those are reflected in Exhibit 15,</p> <p>9 I think it is, or 14. 14.</p> <p>10 Q. In Exhibit 14.</p> <p>11 And is there something in the data</p> <p>12 that you present in Exhibit 14 that in your view</p> <p>13 may help explain the increase in premiums in</p> <p>14 late 2005 and early 2006?</p> <p>15 A. Just by looking at that data the</p> <p>16 answer is, no.</p> <p>17 Q. No?</p> <p>18 A. Because the supply and demand</p> <p>19 factors appear to be moving in opposite</p> <p>20 directions.</p> <p>21 When this is ultimately tested in</p> <p>22 the various methodologies in a more systematic</p> <p>23 way demand, supply, and various parameters to</p> <p>24 reflect that will be undertaken in a regression</p>	<p>1 number four. Also marks the end of today's</p> <p>2 proceeding in the deposition of Dr. John Beyer.</p> <p>3 Going off the record. The time on the video</p> <p>4 screen is 16:35:54.</p> <p>5 (Reading and signature not</p> <p>6 waived.)</p> <p>7 (Whereupon, at 4:36 p.m., the</p> <p>8 deposition was concluded.)</p> <p>9 - - - - -</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>

<p style="text-align: right;">Page 230</p> <p>1 ACKNOWLEDGMENT OF DEPONENT</p> <p>2</p> <p>3 I do hereby acknowledge that I have</p> <p>4 read and examined the foregoing of the</p> <p>5 transcript of my deposition and that:</p> <p>6</p> <p>7 (Check appropriate box):</p> <p>8</p> <p>9 () the same is a true, correct and</p> <p>10 complete transcription of the answers given by</p> <p>11 me to the questions therein recorded.</p> <p>12</p> <p>13 () except for the changes noted in</p> <p>14 the attached errata sheet, the same is a true,</p> <p>15 correct and complete transcription of the</p> <p>16 answers given by me to the questions therein</p> <p>17 recorded.</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24 _____ DATE SIGNATURE</p>	
<p style="text-align: right;">Page 231</p> <p>1 CERTIFICATE OF NOTARY PUBLIC</p> <p>2 I, Paula G. Satkin, the officer before whom</p> <p>3 the foregoing proceedings were taken, do hereby</p> <p>4 certify that the witness whose testimony appears</p> <p>5 in the foregoing proceeding was duly sworn by</p> <p>6 me; that the testimony of said witness was taken</p> <p>7 by me in stenotype and thereafter reduced to</p> <p>8 typewriting under my direction; that said</p> <p>9 proceedings is a true record of the testimony</p> <p>10 given by said witness; that I am neither counsel</p> <p>11 for, related to, nor employed by any of the</p> <p>12 parties to the action in which these proceedings</p> <p>13 were taken; and, further, that I am not a</p> <p>14 relative or employee of any attorney or counsel</p> <p>15 employed by the parties hereto, nor financially</p> <p>16 or otherwise interested in the outcome of the</p> <p>17 action.</p> <p>18</p> <p>19 My commission expires October 31, 2010.</p> <p>20</p> <p>21</p> <p>22 _____ PAULA G. SATKIN</p> <p>23 Notary Public in and for the</p> <p>24 District of Columbia</p>	

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